# Supreme Court of the United States

OCTOBER TERM, 1968

## No. 62

THOMAS R. KAISER,

*Petitioner,*

vs.

NEW YORK.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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[RECORD OF CONVICTION]

STATE OF NEW YORK
COUNTY OF NASSAU

Indictment No. 20122

---

THE PEOPLE OF THE STATE OF NEW YORK

*against*

THOMAS R. KAISER

---

True Name

THOMAS ROGER KAISER

---

CERTIFIED COPY
—of—
RECORD OF CONVICTION

---

* * * *

[INDICTMENT]

COUNTY COURT : COUNTY OF NASSAU

THE PEOPLE OF THE STATE OF NEW YORK

—*against*—

SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, DEFENDANTS

THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, accuse the defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE,

also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE, and DANIEL ROE being to this Grand Jury unknown, of the crime of CONSPIRACY in Violation of Section 580-a of the Penal Law of the State of New York, committed as follows:

The defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, each aiding and abetting the other and acting in concert, in the County of Nassau and elsewhere in the State of New York, from on or about and between the 1st day of May, 1964 to the 15th day of July, 1964, did wilfully, maliciously, feloniously, wrongfully, unlawfully and corruptly, combine, confederate, conspire and agree together to extort money feloniously and unlawfully from Irving Holzman.

The defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, did do and commit the following acts in pursuance and furtherance of said conspiracy and to effect the objects thereof:

1. Between on or about the 1st day of May, 1964 and the 15th day of July, 1964, said defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, each aiding and abetting the other and acting in concert, in the County of Nassau and elsewhere in the State of New York, did

threaten to do physical harm to Irving Holzman and other members of his family unless said Irving Holzman agreed to pay to the said defendants the sum of $25,000 lawful currency of the United States of America, and to further give to said defendants 25% of the income of his various business enterprises in the coin machine industry.

2. The defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, each aiding and abetting the other and acting in concert, did on or about the 8th day of June, 1964 assault one Ruth Holzman, the wife of Irving Holzman, at 155 Sycamore Drive, Roslyn, County of Nassau, State of New York, by threatening her and striking her with a dangerous weapon, to wit, a pistol, and by pushing and beating her.

3. The defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, each aiding and abetting the other and acting in concert, did on or about the 2nd day of July, 1964 have a telephone conversation with Irving Holzman and did threaten him with grievous bodily harm to himself and his family.

4. The defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, on or about the 30th day of June, 1964, each aiding and abetting the other and acting in concert, did make a telephone call to Dolores Billing, the daughter of Irving Holzman, at her home at 65 Sylvia Lane, Plainview, County of Nassau, State of New York, and stated

to her that if her father did not cooperate "they would come to Sylvia Lane and kick her fucking pregnant belly in".

5. The defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, each aiding and abetting the other and acting in concert, did have divers conversations among themselves and with others in which their plans to extort money from Irving Holzman were discussed.

## SECOND COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, of the crime of ATTEMPTED EXTORTION in Violation of Sections 850 and 851 of the Penal Law of the State of New York, committed as follows:

On or about and between the 1st day of May, 1964 and the 15th day of July, 1964, in the County of Nassau and elsewhere in the State of New York, the said defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, each aiding and abetting the other and acting in concert, did wilfully, unlawfully and feloniously attempt to obtain the sum of $25,000 lawful currency of the United States of America and 25% of the income of the various business enterprises of Irving Holzman in the coin machine industry,

the property of said Irving Holzman, with the consent of said Irving Holzman, said consent being then and there induced by a wrongful use of force and fear.

THIRD COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, of the crime of COERCION in Violation of Section 530 of the Penal Law of the State of New York, committed as follows:

The said defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, each aiding and abetting the other and acting in concert, in the County of Nassau and elsewhere in the State of New York, on or about and between the 1st day of May, 1964 and the 15th day of July, 1964, with a view to compel one Irving Holzman to do an act which the said Irving Holzman had a lawful right to abstain from doing, namely, to pay to the said defendants the sum of $25,000 lawful currency of the United States of America and 25% of the income from the business enterprises of the said Irving Holzman, did wrongfully and unlawfully use and attempt the intimidation of the said Irving Holzman by threats of force, namely, to do physical injury to said Irving Holzman and members of his family unless he, the said Irving Holzman, should pay to the said defendants the said sum of money and 25% of the income from his various business enterprises in the coin machine industry.

FOURTH COUNT

THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, of the crime of ASSAULT in the SECOND DEGREE in Violation of Section 242 of the Penal Law of the State of New York, committed as follows:

The said defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, each aiding and abetting the other and acting in concert, in the County of Nassau and State of New York, on or about the 8th day of June, 1964, wilfully and wrongfully assaulted one Ruth Holzman by the use of a weapon and other instrument and thing likely to produce grievous bodily harm.

FIFTH COUNT

THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants, SALVATROE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, of the crime of ASSAULT in the SECOND DEGREE in Violation of Section 242 of the Penal Law of the State of New York, committed as follows:

The said defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as

Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, each aiding and abetting the other and acting in concert, in the County of Nassau and State of New York, on or about the 8th day of June, 1964, wilfully and wrongfully assaulted one Ruth Holzman with intent to commit a felony.

SIXTH COUNT

THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, of the crime of BURGLARY in the SECOND DEGREE in Violaltion of Section 403 of the Penal Law of the State of New York, committed as follows:

The said defendants, SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, the true names of said defendants JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE being to this Grand Jury unknown, each aiding and abetting the other and acting in concert, in the County of Nassau and State of New York, on or about the 8th day of June, 1964, with intent to commit therein the crime of Extortion, broke and entered the dwelling house of Irving Holzman, there being therein at the time a human being.

All of the acts and transactions alleged in each of the several counts of this indictment are connected together and form part of a common scheme and plan.

Dated: July 16, 1964.

/s/ William Cahn
WILLIAM CAHN
District Attorney

No. 20122

Bond

Filed day of 19

Pleads

---

COUNTY COURT

NASSAU COUNTY

---

THE PEOPLE

*vs.*

SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, DEFENDANTS

---

WILLIAM CAHN
District Attorney

---

Indictment for

Consp., Att. Ext., Coercion, Assault 2nd (2 cts.), Burg. 2nd.

---

A TRUE BILL

/s/ Richard S. Ferris
RICHARD S. FERRIS
Foreman

---

Counsel,

Tried the day of 19

Verdict,

Sentenced,

---

[EXCERPTS FROM DOCKET ENTRIES]

COUNTY COURT MINEOLA

NASSAU COUNTY NEW YORK

TRIAL TERM

PRESENT: HON. HAROLD M. SPITZER, COUNTY JUDGE OF NASSAU COUNTY

JUL 16 1964

Indictment # 20122

THE PEOPLE OF THE STATE OF N.Y.

-*vs.*-

THOMAS R. KAISER

Norman Levy
Ass't District Attorney

Michael J. Capanegro
Counsel for Deft.

The said Thomas R. Kaiser having on July 16, 1964, been indicted for Conspiracy in Vio Sect. 5800 of P.L.; attempt extortion in Vio. of Sect. 850 & 851 of P.L. of State of N.Y.; Coercion in Vio. of Sect. 530 P.L. of State of N.Y.; Assault 2nd Degree in Vio Sect. 242 of P.L. of State of N.Y. 62 Counts; Burglary 2nd Degree in Vio. Sect. 403 of P.L. of N.Y. State was arraigned before the Court.

Before pleading to the indictment the defendant was informed of his right to counsel and of Sec. 335-B of C.C.P. and further asked if he desired the aid of counsel.

The defendant did not ask for the aid of counsel.

The defendant entered a plea of not guilty as charged. Remanded to County Jail Pending Trial—Bail Fixed at $25,000.—

COUNTY COURT MINEOLA

NASSAU COUNTY NEW YORK

TRIAL TERM

PRESENT: HON. JAMES L. DOWSEY, COUNTY JUDGE OF NASSAU COUNTY

APRIL 13th, 1965

Indictment # 20122

PEOPLE

*v.*

THOMAS R. KAISER

Warren Doolittle
Asst D.A.

Irwin L. Germaise,
by Saul Haring

Mr. Haring appeared in Court and filed a notice of appearance by Irwin L. Germaise, to represent the defendant Thomas R. Kaiser.

Mr. Haring then moved to reinstate bail bond that was forfeited on April 12, 1965.

Motion denied without prejudice to renew on proper application.

COUNTY COURT MINEOLA

NASSAU COUNTY NEW YORK

TRIAL TERM

PRESENT: HON. JAMES L. DOWSEY, COUNTY JUDGE OF NASSAU COUNTY

NOVEMBER 15th, 1965

Indictment # 20122

PEOPLE

*v.*

THOMAS R. KAISER

Trial adjourned to March 28, 1966, the defendant having submitted two motions to the Court (1) to inspect Grand Jury minutes and (2) to suppress evidence.

District Attorney to answer by Nov. 18, 1965, and defendant to reply by Nov. 22, 1965.

Bail Bond continued.

the 18th, 19th, 20th, 23rd, 24th, 25th and 26th days of May, 1966.

PRESENT: Hon. James L. Dowsey, County Judge of Nassau County.

Indictment No. 20122

THE PEOPLE OF THE STATE OF NEW YORK

*against*

THOMAS R. KAISER

Warren Doolittle,
Assistant District Attorney

F. Courts Bouse, Esq.

Defendant charged with Consipracy in Violation of Section 580-A of the Penal Law of the State of New York; Attempted Extortion in Violation of Section 850 and 851 of the Penal Law of the State of New York; Coercion in Violation of Section 530 of the Penal Law of the State of New York; Assault 2nd degree in Violation of Section 242 of the Penal Law of the State of New York (2 counts); and, Burglary 2nd degree in Violation of Section 403 of the Penal Law of the State of New York.

Case called for Trial. Both sides ready. Defendant informed of Section 369 of C. C. P.

May 25th, 1966: Jury duly drawn, called and sworn, or affirmed. Case continued to May 26th, 1966 for selection of 2 or more alternate juriors. Bail Bond continued.

May 26th, 1966: Hon. James L. Dowsey, having been advised he would have to be hospitalized for immediate surgery, discharged the twelve sworn jurors and the panel of prospective alternate jurors. Defendant continued on bail.

6th, 7th, 8th, 10th, 13th, 14th, 15th, 16th, 20th, 21st, 22nd, 23rd, 27th, 28th, 29th and 30th days of June and the 5th and 6th days of July, 1966.

PRESENT: Hon. Albert A. Oppido, County Judge of Nassau County.

Indictment No. 20122

THE PEOPLE OF THE STATE OF NEW YORK

*against*

THOMAS R. KAISER

True Name: THOMAS ROGER KAISER

Warren Doolittle,
Assistant District Attorney

F. Courts Bouse, Esq.

May 31st, 1966: Defendant charged with Consipracy in Violation of Section 580-A of the Penal Law of the State of New York; Attempted Extortion in Violation of Section 850 and 851 of the Penal Law of the State of New York; Coercion in Violation of Section 530 of the Penal Law of the State of New York; Assault 2nd degree in Violation of Section 242 of the Penal Law of the State of New York (2 counts); and, Burglary 2nd degree in Violation of Section 403 of the Penal Law of the State of New York.

Case called for re-trial. People answered "Ready". Mr. Bouse then requested he be permitted to make motions. Granted.

Jury panel for this case excused from the Courtroom. In the absence of the Jury panel, Mr. Bouse requested a reasonable delay in the start of the case so that he could properly prepare motion papers for dismissal on the grounds of double jeopardy, as fully appears in the record. Decision Reserved. (June 1st, 1966: Motion denied). Mr. Bouse then moved for a hearing on any wire taps to be offered into evidence against defendant. Decision Re-

served. Court directed that a hearing be held on any wire-taps evidence to be offered in the case.

June 1st, 1966: Jury panel excused from the Courtroom. Hearing on admissability of wiretap evidence commenced.

By the Court: The Court finds that there were reasonable grounds for the granting by the Court of the wiretap order.

Panel of jurors returned into Court. Both sides answered "Ready" for trial.

Defendant informed of Section 369 C. C. P.

June 7th, 1966: This cause having been called in its regular order on the Calendar, on motion of Warren Doolittle, Assistant District Attorney for the People ordered that a jury be called and sworn or affirmed, and cause tried.

Mr. Bouse moved for re-consideration of the question of double jeopardy hereto raised, on all grounds fully stated in the record. Motion denied.

July 6th, 1966: The Jury again returned into Court and upon being duly called, did say they find the defendant "guilty" of Counts 1, 2, and 3 and "not guilty" of Counts 4, 5 and 6.

Mr. Bouse moved that the Jury be polled. Jury polled, all 12 jurors answering in the affirmative.

Pedigree taken. Motion to amend to true name, THOMAS ROGER KAISER, granted.

Remanded for sentence August 12, 1966. Jury discharged.

COUNTY COURT TRIAL TERM NASSAU COUNTY

AUG 12 1966

PRESENT: HON. ALBERT A. OPPIDO, COUNTY JUDGE OF NASSAU COUNTY.

Ind. # 20122

The People of the State of New York:

vs. District Attorney [illegible]

Thomas Roger Kane [illegible]

The said Thomas Roger Kane having on July 6 1966 been found Guilty of [illegible] by a verdict of a jury, was arraigned before the Court.

[illegible] moved for an arrest of judgment, and to set aside the verdict as against the weight of evidence and also on the grounds that this Court was without jurisdiction to try this case as only [illegible] are the proper Statutory Remedy.

The following question was asked the defendant: Have you any legal cause to show why judgment should not be pronounced against you? The defendant answered "No".

Whereupon it is Ordered and Adjudged by the Court, that the said Thomas Roger Kane for the felony, [illegible] aforesaid whereof he is convicted, be imprisoned in Sing Sing State Prison at Ossining, New York, at hard labor under an indeterminate sentence the maximum of such imprisonment to be [illegible] years [illegible] months and the minimum [illegible] years [illegible] months thereof.

And it is further

Whereupon it is Ordered and Adjudged by the Court, that the said Thomas Roger Kane for the felony, [illegible] aforesaid whereof he is convicted, be imprisoned in Sing Sing State Prison at Ossining, New York, at hard labor under an indeterminate sentence the maximum of such imprisonment to be [illegible] years [illegible] months and the minimum [illegible] years [illegible] months thereof.

And it is further Ordered that the sentence be served consecutively with the sentence imposed for Conspiracy in violation of Section 580-A of the Penal Law.

And it is further

Whereupon it is Ordered and adjudged by the Court that

vs. : District Attorney: W. Jarvis -

Thomas Roger Kane (alias) / H. Curtis Bowers

The said Thomas Roger Kane having on July 6 1966 been found Guilty of Criminally conspiring to violate Sec. 580-a of P.L. Sec 2 - attempt to violate Sec 580 of P.L. Sec 3 - Criminally conspiring to violate Sec 580 of P.L. by a verdict of a jury, was arraigned before the Court.

Sec. Bowers moved for an arrest of judgment, and to set aside the verdict as against the weight of evidence and also on the grounds that this Court was without jurisdiction to hear and try this case, as only appears on the record. Motion denied.

The following question was asked the defendant: Have you any legal cause to show why judgment should not be pronounced against you? The defendant answered "No".

Whereupon it is Ordered and Adjudged by the Court, that the said Thomas Roger Kane for the felony, aforesaid whereof he is convicted, be imprisoned in Sing Sing State Prison at Ossining, New York, at hard labor under an indeterminate sentence the maximum of such imprisonment to be three years two months and the minimum two years six months thereof. Conspiring to violate Sec 580-A of Penal Law -

And it is further

Whereupon it is Ordered and Adjudged by the Court, that the said Thomas Roger Kane for the felony, aforesaid whereof he is convicted, be imprisoned in Sing Sing State Prison at Ossining, New York, at hard labor under an indeterminate sentence the maximum of such imprisonment to be three years two months and the minimum two years six months thereof. Attempt to violate Sec 580 of the Penal Law -

And it is further Ordered that the sentence is served concurrently with the sentence imposed for Conspiring to violate Section 580-A of the Penal Law.

And it is further

Whereupon it is Ordered and adjudged by the Court that sentence be suspended upon the said Thomas Roger Kane for the Crime of Conspiracy to violate Sec. 580-A of the Penal Law aforesaid whereof he is convicted.

And it is further Ordered that the Defendant be held in the Nassau County Jail, pending application for a certificate of Reasonable Doubt.

COUNTY COURT : NASSAU COUNTY

In the Matter of the Application of
*Norman J. Levy* *, an Assistant District Attorney
of the County of Nassau

—for—

an Order for Interception of
Certain Telephone Communications

*212 LW 4-2523*

The petition of *Norman J. Levy* respectfully shows and alleges:

1. That your petitioner is over twenty-one years of age and resides at *120 Wynsum Avenue, Merrick*, Nassau County, New York, and that since *January 12, 1959* your petitioner has been and is an Assistant District Attorney of Nassau County:

2. That your petitioner is actively engaged in the investigation of crimes committed in violation of the Penal Law of the State of New York, and particularly in the investigation of the crimes of *Attempted Extortion, Conspiracy to Commit the Crime of Extortion and Conspiracy to Commit a Crime* which your petitioner has good and sufficient reason to believe is being committed in Nassau County, New York.

3. That in connection with the aforesaid investigation, petitioner has been conducting an investigation of the criminal activities of *Salvatore Granello, Dino Conte* and John Doe and Richard Roe (said names of John Doe and Richard Roe are fictitious; their true names and identity being unknown to your petitioner) who, your petitioner is informed and believes, have bave been and are engaged in criminal activities in connection with the aforesaid crime, and who, either as participants or as material witnesses, have knowledge or information regarding said

(* This is a form petition and the filled in blanks are here designated by italic.)

crime and are in communication by telephone with other persons having such knowledge and information.

4. That *HEADLINE BAR* has a telephone at *255 West 43rd Street, New York County, New York*, the number of which is *212 LW 4-2523* and that your petitioner is informed and has reason to believe that the said telephone and the communications made over said telephone by the said *Salvatore Granello, Dino Conte* and other persons who use said telephone, are the means of carrying on and promoting criminal activities; and petitioner is informed and has reason to believe that evidence of crime may be obtained by intercepting telephone communications being transmitted over the aforesaid telephone instrument, such crimes being in violation of the Penal Law of the State of New York.

5. That no previous application has been made for the order herein applied for.

WHEREFORE, your petitioner prays that an order be made herein under and pursuant to the provisions of Article I, Section 12, of the Constitution of the State of New York and the statutes relating thereto, and under and pursuant to the provisions of Section 813-a of the Code of Criminal Procedure of the State of New York and the statutes relating thereto, authorizing and empowering the District Attorney of Nassau County and your petitioner as an Assistant District Attorney of Nassau County, and any and all persons employed or assigned to the control and direction of the District Attorney of Nassau County or of your petitioner as such Assistant District Attorney of Nassau County to intercept and record all telephone communications made by and to the said *Salvatore Granello, Dino Conte* and any and all other persons communicating by both incoming and outgoing calls over said telephone located at *255 West 43rd Street, New York* County, New York, now designated as *212 LW 4-2523* from the date of making of such order until, up to, and including *the 29th day of August, 1964.*

/s/ [Illegible]
Petitioner

STATE OF NEW YORK )
) SS.
COUNTY OF NASSAU )

*NORMAN J. LEVY* being duly sworn, deposes and says:

That he is the petitioner named in and who signed the foregoing petition. That he has read the said petition and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

/s/ [Illegible]

Sworn to before me this
*30th* day of *June, 1964.*
NOTARY PUBLIC, STATE OF NEW YORK

/s/ A. Veronica Gallagher
[Expiration Stamp Illegible]

* * * *

DISTRICT ATTORNEY'S INVESTIGATION

RB 2-27-64

212-LW-4-2523

In the Matter of the Application of
Norman J. Levy, an Assistant District Attorney
of the County of Nassau,

—for—

an Order for Interception of
Certain Telephone Communications

County Court, New Courthouse,
Mineola, N.Y., July 1, 1964.

BEFORE:

HON. HAROLD M. SPITZER, County Court Judge.

[In Chambers]

APPEARANCES:

NORMAN J. LEVY, Assistant District Attorney,

Donald J. White, CSR.,
DA Confidential Reporter.

[2] NORMAN J. LEVY, being duly sworn by the Court, testified as follows:

BY THE COURT:

Q State your name and address.

A Norman J. Levy, 120 Winsum Avenue, Merrick, New York. I am an attorney duly licensed and admitted to practice law in the State of New York.

I am and have been an assistant district attorney of Nassau County since January 12, 1959, and I am Chief of the District Attorney's Rackets Bureau.

Since June 8, 1964, I have been conducting an investigation of the crimes of attempted extortion, conspiracy to commit the crime of extortion, conspiracy to commit a crime and felonious assault.

On June 8, 1964, I had a conversation with Irving Holzman who resides at 55 Sycamore Drive, Roslyn, New York. Mr. Holzman resides at 55 Sycamore Drive, Roslyn, with his wife, Mrs. Ruth Holzman.

Mr. Holzman's business is United East Coast Corporation which is located at 583 Tenth Avenue, New York 36, New York. He also maintains a business in the County of Nassau and that business is located at 243 Northern Boulevard, Great Neck.

[3] The nature of Mr. Holzman's business is that he is a distributor of automatic coin machines, juke boxes, game machines, and he is the owner of routes of automatic coin machines locations, juke boxes, game machines and cigarette machines.

Mr. Holzman told me that a principal of one of his juke box routes is one Robert Luttman. Mr. Luttman is also employed by Mr. Holzman as an adjustor and his duties as an adjustor are to adjust problems that arise in connection with automatic coin machine locations that are owned by Mr. Holzman in connection with Mr. Luttman, himself and with others.

Mr. Holzman told me that he became aware that Luttman had gone to a location in the Bronx, the Calypso Lounge, in the end of May, 1964, to adjust a location on behalf of Mr. Holzman. At that location in the Bronx a competitor, Jet Automatic, was seeking to take over a location belonging to Mr. Holzman wherein he had placed an automatic coin machine.

Mr. Luttman went to the Calypso Lounge and spoke with the owner of the premises, and the basis of Mr. Holzman's knowledge is a conversation he had subsequently with Mr. Luttman. This is in regard to the Calypso Lounge.

Mr. Holzman said that Luttman told him that in seek-
[4] ing to keep the location for Mr. Holzman that he, Luttman, had told the owner of the Callypso Lounge that

one Sally Burns was with Mr. Holzman and Mr. Luttman in that location.

Mr. Holzman identified the name Sally Burns as an alias of one Salvatore Granello. Salvatore Granello resides at 215 Mott Street, Apartment A-1 in the Borough of Manhattan in New York City. Salvatore Granello is known through the Intelligence of the District Attorney's Rackets Bureau and Central Intelligence Bureau of the New York City Police Department to be a member of Cosa Nostra.

He is a member of the Thomas Luchesse, alias Three Finger Brown, Family of Cosa Nostra. He is presently under indictment by the federal government, Southern District of New York, and he's charged with income tax evasion.

He's out on bail pending the trial of his case. He has previously been arrested in Orange County for the crime of rape, and he is awaiting trial on that indictment in Orange County.

Mr. Holzman told me that he informed Mr. Luttman that he had had no right to use Sally Burns name in connection with that location or any other location.

Mr. Holzman said that on June 4, 1964, a Thursday, a man came to his New York office located at 583 Tenth Avenue, New York, and identified himself as Dino Conte. [5] Mr. Holzman told me that he believed Conte was a relative of one of his upstate New York customers and as a result spoke with Conte in his office.

At this time Holzman said that Conte indicated that he had been sent by Sally Burns to talk to Holzman. Conte said to Mr. Holzman at that time, "Do you know Charles Morel? Do you know that Playmore is jumping Charles Morel's locations?"

Conte then said to Mr. Holzman, "We're not interested in Morel but the people Morel is with."

A previous investigation by the District Attorney's office has ascertained that Mr. Morel is a principal of Local Vending and that another principal of Local Vending and partner of Mr. Morel's is one Mike Miranda.

Through our intelligence information Michael Miranda has an arrest record. He's previously been arrested twice

for homicide. Both of these charges were dismissed. He has a New York City Police Department B # 129648.

He resides at 167 Greenway North in Forest Hills. Mr. Miranda, according to sworn testimony by Joseph Valachi before the Senate Investigating Committee, is one of the National Commissioners of Cosa Nostra, and he's the advisor or consigilliare to Vito Genovese and the Vito Genovese family of Cosa Nostra.

This information, your Honor, is borne out by our own [6] intelligence information and the fact that Mr. Miranda is a partner of Mr. Morel in Local Vending.

BY THE COURT:

Q Conte said something about Charles Morel jumping locations?

A No, your Honor. Conte said that Playmore was jumping Morel's locations and he said to Mr. Holzman, "We're not interested in Morel, but the people Morel is with."

Q Who is Playmore?

A According to our investigation the principal of Playmore, which is also an automatic coin machine partnership or corporation, is one Harold Kaufman.

Conte at this time asked Mr. Holzman if Holzman was a partner with Playmore. Mr. Holzman informed Conte that he was not.

At this time Conte said to Mr. Holzman, "We know that you bought out your partner's estate and that you now own Long Island National," which is another juke box operation that Mr. Holzman owns.

He had been a partner in this jukebox operation until his partner, one David Simon, died and he had bought Simon's interest out from the estate.

At this point, according to Mr. Holzman, Conte said [7] to him, "You used Sally's name. He doesn't mind, but people are saying you're Sally Burns' partner."

Mr. Holzman told me that he told Conte, "I never used Sally Burns' name; one of my employees did, and he told me he was authorized to use Sally Burns' name."

At this point Mr. Holzman said Conte said, "No one is authorized to use Sally Burns' name." Conte then said

to Mr. Holzman that Burns wanted to have dinner with Holzman that evening.

Holzman told me that he then said to Conte, "You just come in off the street. You tell me you know Sally Burns. How do I know that you know Sally Burns?"

Holzman then started to walk to the telephone and he told Conte that he would call Sally Burns directly and speak to him on the telephone. At that point Holzman said Conte said, "Don't do that." He, Conte, would have Sally Burns contact Holzman within the next hour.

Mr. Holzman said that approximately two hours passed and he then received a telephone call from Sally Burns at his office at 583 Tenth Avenue, New York. During the course of this conversation Burns invited Mr. Holzman to have dinner with him that evening and Mr. Holzman told me that he advised Burns that he would be unable to meet with him that evening.

[8] They then discussed having lunch the next day, Friday, June 6, 1964. Burns asked Mr. Holzman to meet him for lunch at the Charles Restaurant on Sixth Avenue in Manhattan.

Mr. Holzman told me that he told Burns that he was too busy to meet Burns at the Charles Restaurant, but that Burns could come over to Mr. Holzman's office on Tenth Avenue and have lunch with him.

An appointment was made for the next day. Mr. Holzman said that on June 5, 1964, he was in his office at Tenth Avenue and that Burns did not come to his office for lunch, nor did he call him and inform him that he wasn't coming.

On Monday, June 8, 1964, Holzman told me he left for his Manhattan office at approximately 7:40 A.M. Approximately five minutes after he left for work his wife, Mrs. Ruth Holzman, stated that a man rang her doorbell and said that he was from United Parcel.

At this time she was upstairs in their home at 55 Sycamore Drive in Roslyn. She came downstairs to answer the door.

When she opened the front door the unknown man already had the storm door open and he shoved her backwards and she fell to the floor.

[9] According to Mrs. Holzman she stated that the man put his left hand over her mouth and asked her, "Where is your husband?"

She started to scream and during the struggle the man, who had been wearing glasses lost his glasses. When they fell to the floor she grabbed the glasses and held them under her.

During the course of the struggle the man pulled a gun and when she started to scream a neighbor came to her assistance and three men who had been waiting outside the home informed the man who was inside the home that the neighbors were going to call the police, that the cops were coming, "Let's get out of here."

At this time the man who was in the house left the house and the men got into the automobile and left the scene.

Mr. Holzman said that when he arrived at his office—

Q Excuse me for interrupting you.

A Yes, your Honor.

Q Was this assault reported to the police?

A Yes, it was.

Q And is it under investigation?

A It is under investigation at this time, your Honor.

Q Has the neighbor referred to been interviewed?

[10] A Yes, she has.

Q And does she verify these facts?

A Yes, she does, your Honor. And that matter is under investigation jointly by the Sixth Squad of the Nassau Connty Police Department and the office of the District Attorney of Nassau County.

Mr. Holzman informed me that he arrived at work that morning at approximately ten a.m. Strike that.

Mr. Holzman informed me that when he arrived at his office he was told by a business associate to call home right away.

He called his home and was informed by his son-in-law, Ronnie Billing, what had happened to his wife and he was to come—he was told to come right away.

He drove to his home and after arriving there at approximately 12 p.m., one of his employees, one Lou Drutman, called him and advised him that Sally Burns had

been at this office, Holzman's office in New York, and had said that he'd heard on the radio what had happened to Ruth.

Drutman told Holzman that Burns had left a phone number for Holzman to call Burns at. Drutman gave Holzman the telephone number, 212-LW-4-2523.

The subscriber of this telephone is the Headline Bar, Eight Avenue and 43rd Street, New York City. The exact [11] address of the Headline Bar is 253 West 43 Street, New York County.

At that time from his home Holzman called 212-LW-42523 and asked for Sally Burns. Burns spoke to him on the telephone and instructed Holzman to go to an outside phone and call Burns at 212-LW-4-2523, the same number.

Holzman told me that he went to a neighbor's telephone and again called Burns at the same number. Holzman said that he said to Burns over the telephone, "Did you hear what happened to my wife?"

Holzman said that Burns replied, "I know all about it." At this point Burns asked Holzman to come to New York to meet him at the Charles French Restaurant, 452 Sixth Avenue, Manhattan.

Holzman said that he advised Burns that he didn't want to leave his wife and he wanted to know why Burns wanted to see him.

Holzman said that Burns told him that he wanted to talk to him about what happened to Holzman's wife. Holzman said that he asked Burns to tell him over the telephone and Burns said, "Meet me. Don't talk about it on the telephone."

Holzman said that he and his son-in-law, Ronald Bill-[12] ing went to the Charles French Restaurant, 452 Sixth Avenue in New York and arrived there at approximately three p.m.

Holzman said that Burns asked his son-in-law to wait at the bar while he spoke to Holzman. Holzman said that he and Burns sat at a table at the Charles Restaurant and Burns said to him, "It's around the industry that you're in the million dollar class, you're the biggest man in the industry.

"No one gets in that class unless he has someone with him."

Holzman said that at this time he interrupted Burns and said, "I thought you were going to tell me about what had happened to my wife?"

He said that he asked Burns, "Did you hear about it on the radio?" and that Burns replied, "No, I didn't hear about it on the radio; never mind how I heard about it."

At this point Burns said to Holzman, "If you had met me Friday I wouldn't have forgot to come to you and this wouldn't have happened. If I had come home Sunday from Greenwood Lake instead of Monday this wouldn't have happened.

"The people I'm with are animals. They couldn't wait until I came home."

[13] Holzman said that Burns then stopped talking about his wife and said to Holzman, "Even Costello had to give up a piece.

"Now, with you the family wants $25,000 in cash and I want you to give it to them."

Burns then said to him, "I would never mention the word, 'family' but with you I have no worries and I want 25 per-cent of what you have—not what your partners have—just you."

Burns said to him, at the end of each week he and Burns would meet and have dinner and for every dollar Holzman took in he would keep 75 cents and 25 cents would go to Burns.

He told Holzman, "If at the end of the week you have $1 left I take 25 cents and you keep 75 cents."

At that time Burns asked Holzman for an answer and he told him that he couldn't give him an answer at that time, he'd have to think about it.

Burns then asked Holzman to meet him the next day, Tuesday, June 9, 1964, at the Charles Restaurant.

That evening, Monday, June 8, 1964, myself, District Attorney Cahn and Detective Shephard and Detective Costello were advised of the meeting between Burns and Holzman at the Charles Restaurant.

[14] Holzman also stated that as he was leaving the meeting with Burns that had taken place at the Charles

Restaurant he observed Dino Conte in the bar of the Charles Restaurant. He had no conversation with Conte at that time.

Holzman stated that the meeting to take place on Tuesday, June 9, 1964, at the Charles Restaurant with Salvatore Granello, alias Sally Burns, was set for 12 o'clock noon.

The next day at approximately 12 o'clock noon Holzman in my presence called the Charles Restaurant and spoke to Sally Burns. He asked Burns if he should go out to an outside telephone and call Burns back. Burns said that he wanted Holzman to do that.

Holzman then went to an outside telephone in the presence of myself, Assistant Chief Inspector James Farrell of the Nassau County Police Department, Lt. Frank O'Shea of the Nassau County Police Department, Commanding officer of the Sixth Detective Squad, and Nassau County Detectives Harold Shepherd and Clifford Crawford, both of whom are assigned to the District Attorney's Squad.

At that Holzman placed a telephone call to the telephone number 212-GR 7-3300. The subscriber of that telephone number is the Charles French Restaurant, Inc., located at 452 Sixth Avenue, New York City.

This telephone call was made from the Oaks Pharmacy [15] in Roslyn, County of Nassau, State of New York, and the telephone call was monitored and recorded with the permission of the owner of the Oaks Pharmacy.

Q Holzman knew about it too, I assume?

A And Mr. Holzman. In this conversation Mr. Holzman asked for Sally Burns and Burns got on the telephone.

Mr. Holzman told Burns that someone had been in the phone booth and he had to wait.

Holzman then said to Burns, "On that conversation yesterday, you know, first of all, I don't have any method of raising $25,000 for the family and I think that that should be reduced.

"I think that your request is a little bit out of line."

That he, Holzman, had put in 26 years in this business and that was a big chunk to give away.

Burns said to Mr. Holzman, "Alright, let me say this to you. You know the way I feel about you and I feel worse than you do about what happened, and I want you to know that's an outside faction."

Burns said that he would explain it to Holzman when he saw him. Burns said that it wasn't his people, his friends.

Burns told Holzman that he would explain to Holzman [16] what was involved and what the past history was to this thing.

Burns said to Holzman, "Between you and I as far as a lot of things that have transpired where I was mentioned, et cetera, and so on, to me it's unimportant.

"I'd like, I'd like, I'd love to be with you and I want you to be with me, but I want to start off right.

"If you feel that you want me—Do you want me to be with you?"

And Holzman said to Burns, "Well, I told you yesterday that with you I could get along but as far as these fancy figures for me to go on financing and stuff like that and to have to, you know, the thing is it don't add up, Sal, it just don't add up."

Burns then said, "Well, then I will tell you what you better do, Irv.

"The first thing to do, Irv, the best thing to do if you feel that way about it, 'cause I want to explain, see, I would, I would help you in that situation myself.

"I don't want to come in there for nothing, you understand. I don't want to come in there for nothing, but I must explain to you better than I did yesterday what the, what it involves and how many different—

'There are different elements involved here, you know, [17] that wanted to take a shot at you.

"You understand what I'm talking about?"

Holzman said, "Yes, but that deal yesterday, that is the worst part, you know, I can't understand why you couldn't have stopped that."

And Burns said, "Well, no, no, I will explain you that, too. This was an outside thing where other people wanted to come into the picture.

"Now, the thing is either I have to know that I'm in there or I'm not in there, and I'm not pushing you, take it easy and take care of her. That's more important.

"That is why I suggested for you to have dinner together and I think—"

And Holzman said, "Well, of course—"

And Burns continued and said, "—you'll feel better." Then Holzman said, "I know first of all she's marked up pretty bad and I don't know when she'll be able to walk out of the house."

And Burns said, "Alright."

And Holzman said, "Whoever that was—"

And Burns interuppted him and said, "Alright, I will take care of that in my own way. You'll have satisfaction [18] through my way, you understand, which I don't care to discuss on the phone.

"Let me take care of it and you will be very satisfied. I will take care of it my way because I found out more about the story.

"It wasn't my friends involved here. It was friends, but from other people."

Holzman then said, "Yes."

And Burns said, "If you understand what I'm talking about, and I will take care of that. I'll have the satis— you'll have satisfaction there my way, understand?

"But as far as the deal what I want to do with you, Irv, I think you should come in today."

Holzman told Burns that he couldn't come in, and Burns said, "You can't?"

And Holzman said, "I can't leave her today, If I leave her I ain't going to have a wife, you know."

And Burns said, "No, no, that's more important. If she feels that way you stay home, but I would like you to come down, sit down and you and I, I think we can work the whole thing out. It could worked out."

And Holzman interrupted and said, "Well, listen—"

And Burns continued, "It's bad for you to—I'm sorry— and, uh, if it can't be, it can't be, it's alright.

[19] "Either way, whatever you say. You mean that you want to forget it?"

Holzman said, "Well, I—"

And Burns said, "I wouldn't want you to do that, believe me, as your friend I don't want you to do that."

Holzman said, "Well, Sally, look, first request is way out of line. I just got through buying out an estate and I have means of going out to raise that kind of money in cash.

If I have go to out and borrow it they're not, nobody is going to lend it in cash,"

And Burns said, "Let me say this to you. We'll work that out because I could help you in that situation myself.

"I'll be part and parcel of it with you and when I explain it to you you'll know what I'm talking about, you understand?"

Burns then asked Holzman to again come in and visit him and Holzman said, "You know last night I was a little bit upset with the whole situation, you know, especially after I left you.

"I became upset myself. The thing is getting so that what's the sense of knocking your brains out if these [20] things are going to happen?"

Burns said, "Well, there ain't nothing going to happen. That is what I want to eliminate, and that is the missing link with you, Irving, and you can believe what I'm telling you.

"Then you can do what you want. You can do anything you want. I told you that.

"As far as I'm concerned I think I'm a necessary evil in this situation and the way it will clarify everything all the way around and wencan go forward.

"There'll be no nonsense involved and nothing else, and I'm telling you."

And then Holzman again told him, "I think that the 25 thousand is way out of line."

And Burns said, "The figure can't be changed, but here's what I'm going to do.

"I'm going to do something on my own to work it out."

And Holzman interrupted and said, "Sally, they've got to change the figure. I'm not going to go for $25,000. I told your yesterday.

I know I can deal with you but I'm not going to go for $25,000."

[21] And Burns answered, "Look, you've made your mind up definitely that way, then there is no sense even meeting if you don't want to."

And Holzman said, "I don't say I don't want to meet but I say I'm not going for 25."

And Burns said, "But I want to explain to you, I'll do my best for what I have to do. I know what I have to do, but I can work it out.

"I told you I could work it out."

Burns then said, "Let me sit down with you and we'll discuss it and then maybe I'll go there and say, 'Look, this is what I'm going to do, I'm going, I am doing it on my own, this is for me,' maybe it will be a little different picture, but I can't pick your brain.

"I got to sit down and talk to you, you and I together."

Burns then asked Holzman to again meet him the next day and Burns gave Holzman his home telephone number CA 6-2638, and asked Holzman to call him the next morning at 10 o'clock and let Burns know whether Holzman could meet him at noon at the Charles Restaurant.

Burns said, "You just talked to me in the morning. I'll tell you what to do, call me tomorrow morning at 10 o'clock home," and further told Holzman, "Go outside and [22] call me, and tell me if you're coming in and I'll meet you at 12 o'clock at Charles."

Burns then told Holzman, "If you want to call me, call me tonight," and Holzman asked him:

"Where? At home?"

And Burns told him, yes, he'd be home, but if he wasn't home to call him at this other number, CAnal 6-8509.

Burns told Holzman that, "That's Patrissy's; remember the restaurant downtown, the one on Kenmare Street," and he again gave Holzman the number CAnal 6-8509.

Thereafter, Burns gave Holzman another telephone number.

He said to him, "And the other number I gave you yesterday, I go there once in awhile for a drink, you know."

And Holzman said, "Is that the LW number?"

And Burns said, "LW."

And Holzman told him that he had that number.

Holzman then told Burns, "I'll call you in the morning."

On June 10, 1964, Holzman called Burns at CAnal 6-2638, the code number was 212. CAnal 6-2638 checks to Nancy Granello, 215 Mott Street, Apartment A-1, New York County.

[23] Nancy Granello is known to be the wife of Salvatore Granello, and this is Granello's residence.

The telephone number 212-CA-6-8509 checks to the subscriber Partrissy's Restaurant, 96 Kenmare Street, New York, New York County.

On June 10, 1964, when Holzman called Burns at his home he told Burns that he would call him at 12 o'clock at the Charles Restaurant.

Holzman didn't call Burns at the Charles Restaurant at 12 o'clock on June 10, 1964, and thereafter, during the afternoon of June 10, 1964, Dino Conte called Holzman at his home and told Holzman that Sally was waiting for Holzman's call and told Holzman further, "Well, you should call him and let him know if you want to see him or don't want to see him, 'cause he's waiting."

Conte told Holzman that Sally had left the Charles Restaurant and was now at the LW number. Holzman then called 212-LW-4-2523, the Headline Club, and spoke with Sally Burns.

Burns asked Holzman what happened and Holzman told him, "Do you know Dino just called me. I didn't want to call you.

"I'm upstairs you know. Bill Cahn posted a man here 24 hours. I don't want to call you from home with a guy sitting in."

[24] Burns told Holzman, "Why don't you take a ride out? Two minutes. You know I waited for your call."

Holzman told Burns, "Well, the man goes with me, that's what Cahn told him to do."

And Burns answered, "Irving, look, I know you're home. It's allright. Do you want to see me or you don't want to see me."

Holzman said, "Well, I'm not coming into New York for a couple of days and I'm staying here."

Burns then said, "I would like to see you on this one way or the other. I know what you want me to do and I'll

know what you want me to do, and I'll get away from the picture altogether."

And Holzman told Burns that he'd see him when he came into New York and as soon as he came into New York.

Holzman told Burns that he would be in New York on Monday. Burns told Holzman, "I understand, but at the same token you know when I tell you, Iving, I waited for you, I don't go no place, I wait for you." Holzman told Burns he was sorry.

Buns said to Holzman, "It's important to me, too, you know what I mean."

Holzman said, "I was doing this for you, not for me." And Burns said, "Okay, buddy. Look, try to get in touch [25] with me Friday morning."

Holzman said, "If not, you will hear from me."

And Burns said, "I go up to the country."

And Holzman said, "If you go up to the country you will hear from me Monday before 12 o'clock."

And Burns said, "In fact, I'll tell you the truth, what I would like you do Saturday or Sunday, put Ruth in a car and come up to the house and stay the whole day with me and she'll be a new woman; that's what I would like youto do."

And Holzman said, "Well, where is this place?"

Burns said, "It's in Greenwood Lake."

Holzman said, "Greenwood Lake is a big place."

Burns said, "Well, I could give you the whole instructions. You come right over the mountain and in fact, Dino will come with you and show you the place."

Holzman said to Burns, "Let me put it this way. If I can convince her to go up I will call you Friday morning at the house."

Burns said to Holzman, "Well, you do that, call me and give her my love."

Holzman said to him, "And don't forget I didn't call because—" And Burns interrupted him and said, "Allright, but I wanted to hear from you, Irving.

"You know how I am when I do something, I do it right."

[26] Holzman said, "But you know where I am, too."

And Burns said, "Allright, I don't care. I don't care who's there, and who's not there. With me I'm one way.

"If I have to do something for you I'll do it, and if we don't want to do it, forget about it.

"So you call me Friday morning. If you come in early call me."

And that was the end of the conversation.

On Monday, June 15, 1964, Holzman met with Burns at his New York office at 583 Tenth Avenue, New York. The meeting was set up after a telephone call from Holzman to Burns at Burns' home, CAnal 6-2638.

During the course of the meeting at Holzman's office Burns gave Holzman his Greenwood Lake telephone number, Code number 914, GR 7-2439. The telephone number 914, GR 7-2439 checked to the subscriber Nancy Granello, Lakelands, Greenwood Lake.

Nancy Granello is the wife of Salvatore Granello, alias Sally Burns.

On Tuesday, June 23, 1964, Holzman again met with Salvatore Granello-Sally Burns at his New York office. At that time Burns asked Holzman for $12,500 for the family, and he told Holzman that Holzman should make a [27] $5,000 down payment by that coming Friday.

He told Holzman, "You can't keep stalling." And he advised Holzman, "if you don't want to make a deal with them I'll bow out."

Holzman told Granello that he would let him know by Friday or the latest Monday.

On Friday, June 26, Dino Conte called Drutman, an employee of Holzman's at Holzman's office in New York and told Drutman that Irving made an appointment and didn't keep it and that is now way to act.

On Monday, June 29, Holzman called Granello and told Granello that he wasn't going to give any money to the family and he wasn't going to give Granello any part of his business.

Granello told Holzman, "Okay, buddy, I'm bowing out. Now you're on your own."

On Tuesday, June 30, Delores Billing who is the married daughter of Irving Holzman received a telephone call

at her home. Her telephone number is OV-1-0271. The call was received at approximately 10:20 a.m.

The caller said to Delores Billing, "Delores, if your father doesn't cooperate we'll come to Sylvia Lane and kick your fucking pregnant belly in."

Holzman's daughter resides with her husband, Ronald [28] Billing at 65 Sylvia Lane, Plainview and she is presently pregnant.

During the course of this investigation I spoke with Joseph Albino who is a business associate of Irving Holzman. Both Holzman and Albino told me that they knew Salvatore Barbella also known as Rocco Barbella, also know as Rocky Graziano.

Albino said that he entered Mercy Hospital on Thursday, June 18, 1964, for an operation. He said that on Tuesday, June 23, 1964, he received a telephone call at Mercy Hospital in Rockville Centre, Nassau County, New York, from Rocky Graziano.

Graziano said to him, "I met a guy on the street in New York who walked up to me and said, 'Your cousin is in the hospital.' "

Graziano asked Albino if he could come to see him in the hospital. And he also said to Albino, "I understand your partner, Irv, and you are having a little trouble.

"I can't talk to you on the phone. Can you read between the lines? Can I come up to see you?"

Albino told Graziano that he could come to see him at Mercy Hospital.

Graziano, according to Albino, didn't come to see him in [29] the hospital, but on Sunday, June 28, Graziano during the morning stopped at Albino's home in West Hempstead.

Albino told me that Graziano said to him that he Graziano was sitting at a table with guys the other day and these guys were talking rough. "They said they were going to hurt your partner, Irv, and you."

Graziano said to Albino, "I told them you were my cousin and that they shouldn't hurt you." Graziano then asked Albino, "What did you do to aggravate them? You must have done something."

Albino told Graziano at that time that he nothing to do with Holzman's business in New York; that he was

only his partner in Nassau County and in other parts of Long Island.

Graziano then asked him, "What did Irving do to them?" At that point Albino told me that he told Graziano that Sally Burns wanted $25,000 in cash from Holzman for the family and 25 per-cent of his business.

At that point Albino said Graziano said to him, "Don't take sides. If you're asked you stay neutral. Don't worry. You're not going to get hurt."

At the end of the conversation Graziano said to Albino, "The guys want to know an answer. Tell him the guys are waiting for an answer."

[30] In regard to Robert Luttman and in addition to the testimony that I've previously given with regard to Luttman I wish to state that Holzman told me that approximately seven months ago he was engaged in a conversation with Luttman about women; and during the course of this conversation Luttman indicated to Holzman that he was being kept by a woman who gave him thousand-dollar bills as spending money.

Holzman said to me that during the course of this conversation with Luttman he made up a story which he told Luttman that he, Holzman, was keeping company with a Copacabana chorus girl named Joyce.

Holzman told me that he didn't know any Copacabana chorus girls, let alone one named Joyce, and that he wasn't keeping company with any woman.

He said that he made this story up during the course of his conversation with Luttman. Holzman further stated that at the time of his meeting with Salvatore Granello alias Sally Burns on June 15, 1964 at his business in New York City Burns said to him, "I did you a favor. I know a shylock who works at the Copacabana and I told him to tell Joyce to forget you because you're a married man."

Holzman stated to me that this information couldn't have been given to Burns by anyone other than Luttman because Luttman was the only one present when he made this statement.

[31] On June 30, -964, Detective Fred Pawel and Detective Thomas Costello of the Nassau County Police Department assigned to the District Attorney's office, were in Patrissy's Restaurant.

On that occasion they observed Salvatore Granello alias Sally Burns in the bar of that restaurant. During the course of this surveillance of Salvatore Granello alias Sally Burns, Burns used two public telephones.

The telephone numbers of these two public telephones are CA 6-8509 and CA-6-8854. The telephone number CAnal 6-8854 is listed to Patrissy's Restaurant, 98 Kenmare Street, New York County, New York.

I wish to correct for the record, your Honor, I had earlier said that Salvatore Granello alias Sally Burns was presently under indictment charged with rape as a felony. On July 19, 1963, that indictment was dismissed and I was in error when I told you that the indictment was pending.

On July 17, 1940, Granello was arrested by the State Police, Trenton, New Jersey, and charged as a disorderly person and received a sentence of ten days.

On October 6, 1940, he was arrested in Manhattan for assault and robbery and the final disposition of that case [32] was a conviction for assault in the third degree.

On January 29, 1949 he was arrested in New York City and charged with violation of the Selective Service Laws and prosecution was denied by the federal authorities thereafter.

On July 25, 1947, he was arrested in Manhattan and charged with Grand Larceny. That charge was discharged in Manhattan Felony Court.

On January 14, 1959 he was arrested in Brooklyn and charged with 887 of the Code of Criminal Procedure, subdivision 1, vagrancy, and that charge was dismissed.

He is presently under indictment as I've previously testified and charged with income tax evasion.

On this indictment his co-defendant is one George Levine. George Levine is the stepfather of Rocky Graziano. Joseph Albino informed me that Graziano is the Godfather of Granello's youngest child, a daughter.

MR. LEVY: Your Honor, on the affidavit of Norman J. Levy, Assistant District Attorney, and the sworn testimony of Norman J. Levy before your Honor, the People make application to intercept and record all telephone communications over a telephone instrument bearing tele-

[33] phone number 212-LW-4-2523. This telephone instrument is located at 252 West 43 Street, New York County, New York.

The subscriber of that telephone is the Headline Bar which is located at 252 West 43 Street, New York County, New York.

The basis of the People's application, your Honor, is the affidavit by Norman J. Levy that is before you and the sworn testimony of Norman J. Levy which you have heard.

THE COURT: Mr. Levy, have you been trying to verify whether the daughter of Holzman was in fact threatened?

MR. LEVY: Your Honor, Detective John Skuzenski of the Nassau County Police Department assigned to the District Attorney's Squad interviewed Mrs. Delores Billing at her home on Sylvia Lane yesterday and the facts that I testified to before your Honor were stated to Detective Skuzenski by Mrs. Billing.

The District Attorney's office and the Nassau County Police Department are working on an investigation to identify the caller.

THE COURT: At the present time have you been able to get any clue which would lead you definitely to the [34] caller?

MR. LEVY: We have not, your Honor.

THE COURT: You feel as though this tap will assist you in that quest?

MR. LEVY: Yes, your Honor.

THE COURT: From your experience over the years do you feel that there is reasonable ground to believe that evidence of crime may be obtained by intercepting messages over this telephone?

MR. LEVY: Yes, your Honor. This telephone has been used by Salvatore Granello alias Sally Burns in telephone conversations with the complainant, Irving Holzman, in regard to the demand for $25,000 and 25 per-cent of his business.

THE COURT: So that in addition to the alleged extortion you are faced here with the threats of violence and physical harm to innocent people?

MR. LEVY: Yes, your Honor, and the investigation regarding the assault on Mrs. Ruth Holzman at her home in Nassau County as well as the threatening telephone call to Mrs. Billing.

THE COURT: I am satisfied that there is reasonable ground for granting your application.

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COUNTY CLERK'S OFFICE, )
STATE OF NEW YORK, ) SS:
COUNTY OF NASSAU )

I, HAROLD W. McCONNELL, Clerk of the County of Nassau and of the Supreme and County Court of Record, do hereby certify that I have compared the annexed with the original minutes of Ex Parte Hearing filed in my office May 24, 1968 and that the same is a true transcript thereof and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court May 29, 1968.

/s/ Harold W. McConnell
Clerk

COUNTY COURT : NASSAU COUNTY

In the Matter of the Application of
*Norman J. Levy* [*], an Assistant District Attorney
of the County of Nassau

—for—

an Order for Interception of
Certain Telephone Communications

*212 LW 4-2523*

Upon the annexed petition of *Norman J. Levy* and the sworn testimony of *Norman J. Levy* there is reasonable ground to believe that evidence of crime may be obtained by intercepting telephone communications being transmitted over telephone instrument bearing telephone number *212 LW 4-2523* located at *255 West 43rd Street*, New York County, New York, it is

ORDERED that under and pursuant to the provisions of Article I, Section 12, of the Constitution of the State of New York and the statutes relating thereto, and under and pursuant to the provisions of Section 813-a of the Code of Criminal Procedure of the State of New York and the statutes relating thereto, the District Attorney of Nassau County and the said *Norman J. Levy* as an Assistant District Attorney of Nassau County, and any and all persons employed or assigned to the control and direction of the District Attorney of Nassau County and the said *Norman J. Levy* be, and they hereby are, authorized and empowered to intercept and record all telephone communications made by and to *Salvatore Granello*, *Dino Conte* and any and all other persons communcating by both incoming and outgoing calls over the telephone located at *255 West 43rd Street, New York County*, New York, now designated as *212 LW 4-2523* and by whatsoever number the said telephone and telephone line may be hereafter designated, and it is further

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(* This is a form order and the filled in blanks are here designated by italic.)

ORDERED, that the District Attorney of Nassau County and the said *Norman J. Levy* as an Assistant District Attorney of Nassau County, or their duly authorized agent, or agents, be, and they hereby are, authorized and empowered to cut, break, tap, and make connection, with any and all wires leading to and from said telephone instrument that the said District Attorney of Nassau County or said *Norman J. Levy*, or their agents may deem reasonably necessary to intercept telephone communications transmitted over the said wire and to do all things necessary to permit the communications being transmitted over said telephone instrument to be intercepted under and pursuant to the provisions of this order; and it is further

ORDERED, that this order shall be effective and in force until *the 29 day of August, 1964.*

Dated: Mineola, New York
[June 30,] 1964
*July 1*

/s/ Harold M. Spitzer
County Judge of Nassau County

COUNTY CLERK'S OFFICE, )
STATE OF NEW YORK, ) SS:
COUNTY OF NASSAU )

I, HAROLD W. McCONNELL, Clerk of the County of Nassau and of the Supreme and County Courts of Record, do hereby certify that I have compared the annexed with the original Order for Interception filed in my office Dec. 14, 1965, and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court May 29, 1968.

/s/ Harold W. McConnell
Clerk

COUNTY COURT : NASSAU COUNTY

In the Matter of the Application of
*Norman J. Levy* [*], an Assistant District Attorney
of the County of Nassau

—for—

an Order for Interception of
Certain Telephone Communications

*212 CA 6-8509—CA 6-8854*

Upon the annexed petition of *Norman J. Levy* and the sworn testimony of *Norman J. Levy* there is reasonable ground to believe that evidence of crime may be obtained by intercepting telephone communications being transmitted over telephone instruments bearing telephone numbers *212 CA 6-8509 and CA 6-8854* located at *98 Kenmare Street, New York* County, New York, it is

ORDERED that under and pursuant to the provisions of Article I, Section 12, of the Constitution of the State of New York and the statutes relating thereto, and under and pursuant to the provisions of Section 813-a of the Code of Criminal Procedure of the State of New York and the statutes relating thereto, the District Attorney of Nassau County and the said *Norman J. Levy* as an Assistant District Attorney of Nassau County, and any and all persons employed or assigned to the control and direction of the District Attorney of Nassau County and the said *Norman J. Levy* be and they hereby are, authorized and empowered to intercept and record all telephone communications made by and to *Salvatore Granello, Dino Conte* and any and all other persons communicating by both incoming and outgoing calls over the telephones located at *98 Kenmare Street, New York County,* New York, now designated as *212 CA 6-8509 and CA 6-8854* and by whatsoever number the said telephones and telephone lines may be hereafter designated, and it is further

(* This is a form order and the filled in blanks are here designated by italic.)

ORDERED, that the District Attorney of Nassau County and the said *Norman J. Levy* as an Assistant District Attorney of Nassau County, or their duly authorized agent, or agents, be, and they hereby are, authorized and empowered to cut, break, tap, and make connection with any and all wires leading to and from said telephone instruments that the said District Attorney of Nassau County or said *Norman J. Levy*, or their agents may deem reasonably necessary to intercept telephone communications transmitted over the said wires and to do all things necessary to permit the communications being transmitted over said telephone instruments to be intercepted under and pursuant to the provisions of this order; and it is further

ORDERED, that this order shall be effective and in force until *the 29th day of August, 1964.*

Dated: Mineola, New York, July 1, 1964.

/s/ Harold M. Spitzer
County Judge of Nassau County

COUNTY COURT : NASSAU COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

*-against-*

THOMAS R. KAISER, DEFENDANT

SIR:

PLEASE TAKE NOTICE that upon the Indictment herein and upon the annexed affidavit of MICHAEL J. CAPANEGRO, sworn to the 24th day of August, 1964, the undersigned will move this Court at a Special Term, Part I thereof, to be held in and for the County of Nassau at the County Courthouse at Old County Road, Mineola, New York, on the 2nd day of September, 1964, at 9:30 A.M., or as soon thereafter as counsel can be heard, for an Order granting the above named defendant leave to inspect the Grand Jury Minutes of the testimony upon which the Indictment herein was based, and upon such inspection, for an Order dismissing the Indictment heretofore returned against the said defendant on the 16th day of July, 1964, charging him with the crimes of conspiracy, in violation of Section 580-a of the Penal Law of the State of New York; attempted extortion, in violation of Section 850 and 951 of the Penal Law of the State of New York, coercion, in violation of Section 530 of the Penal Law of the State of New York; assault in the second degree, in violation of Section 242 of the Penal Law of the State of New York; assault in the second degree, in violation of Section 242 of the Penal Law of the State of New York; and for the crime of burglary in the second degree, in violation of Section 403 of the Penal Law of the State of New York, upon the ground that the evidence adduced before the Grand Jury upon which said Indictments were based was insufficient in law to warrant the findings there and that such inspection of the Grand Jury

Minutes is necessary therefor, and, for such other and further relief as the Court may deem just and proper.

Dated: Flushing, New York, August 21, 1964.

Yours, etc.,

MICHAEL J. CAPANEGRO
Attorney for Defendant
THOMAS R. KAISER
Office & P.O. Address
136-51 37th Avenue
Flushing, New York

TO:

WILLIAM CAHN
District Attorney
County Court House
Mineola, New York

* * * *

COUNTY COURT : NASSAU COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

*-against-*

THOMAS R. KAISER, DEFENDANT

STATE OF NEW YORK )
)
COUNTY OF QUEENS )

MICHAEL J. CAPANEGRO, being duly sworn, deposes and says that:

He is the attorney for the defendant THOMAS R. KAISER, above named, hereinafter referred to as Defendant.

Said defendant was indicted on the 16th day of July, 1964, by the Grand Jury of Nassau County for the crimes of conspiracy, in violation of Section 580-a of the Penal Law of the State of New York; attempted extortion, in violation of Section 850 and 851 of the Penal Law of the

State of New York; coercion, in violation of Section 530 of the Penal Law of the State of New York; assault in the second degree, in violation of Section 242 of the Penal Law of the State of New York; assault in the second degree, in violation of Section 242 of the Penal Law of the State of New York; and for the crime of burglary in the second degree, in violation of Section 403 of the Penal Law of the State of New York. A copy of such Indictment is annexed hereto and made a part hereof, marked Exhibit "A".

The defendant pleaded not guilty to the said Indictment on the 16th day of July, 1964, and was admitted to bail in the amount of $25,000.00, and is presently free on such bail.

This motion is twofold and seeks an order granting the defendant an inspection of the Minutes of the Grand Jury Hearing, and upon such inspection, a consideration of the dismissal of the Grand Jury Indictment.

Your deponent has made a reasonable effort to ascertain what has been testified to before the Grand Jury, and what was learned.

On the 20th day of August, 1964, a certified letter was sent to the District Attorney of Nassau County, William Cahn, requesting names and addresses of witnesses who testified before the Grand Jury, and for an inspection of the Grand Jury Minutes. Said request was denied. Deponent has neither the knowledge nor the means of securing such knowledge to ascertain the testimony and names and addresses of the witnesses.

On information and belief, defendant is not guilty of any of the charges in the Indictment on the ground that the evidence received by the Grand Jury was insufficient to support the said Indictment and, on information and belief, there is an absolute failure of proof of any of the essential elements of the crimes under each Count of the Indictment. Deponent will take each Count of the Indictment separately, as follows:

* * * *

On information and belief, the evidence which was submitted to the Grand Jury was illegal and improper, and none but legal evidence should have been submitted. Telephonic interceptions, being illegal, should not have

been presented to the Grand Jury as it was obtained as a result of unreasonable search and seizure, without the permission of the person affected. On information and belief, if any telephonic interceptions which were made, were not made pursuant to Section 813a of the Code of Criminal Procedure, and if such telephonic communications were made pursuant to an order to wire tap, then such interception and Section 813a are in violation of the Fourth Amendment. Telephonic interceptions or any wire tap evidence which were submitted to the Grand Jury, did not have any corroboration of identifying witnesses who could identify the voice of the defendant, Thomas Kaiser, with that on the alleged telephonic interception.

On information and belief, such inspection of the Grand Jury Minutes would not work to the prejudice of the People nor serve to defeat the ends of justice.

No previous application has been made to this Court or any other court for the relief sought herein.

WHEREFORE, your deponent respectfully prays that this Court grant an Order permitting the defendant and this Court to inspect the Minutes of the Grand Jury, and upon such inspection, further grant an Order setting aside the Indictment against this defendant, bearing Index Number 20,122 of 1964, handed down on July 16, 1964, as to each and every Count of the Indictment as regards the defendant, THOMAS R. KAISER, or any part of the said Indictment, and for such other and further relief as this Court may deem just and proper.

/s/ Michael P. Capanegro

Sworn to before me this
24th day of August, 1964.

DONALD WARREN
Notary Public, State of New York
No. 41-9538050 Queens County
Certificate Filed in New York County
Term Expires March 30, 1966

* * * *

C-371

# MEMORANDUM

## COUNTY COURT : NASSAU COUNTY

BY HON. JAMES L. DOWSEY, JR. County Judge
DATED December 15, 1964

Indictment # 20,122

THE PEOPLE OF THE STATE OF NEW YORK

*vs.*

THOMAS R. KAISER, DEFENDANT

HON. WILLIAM CAHN
District Attorney of Nassau County
Mineola, New York

MICHAEL J. CAPANEGRO
Attorney for Defendant
136-51 - 37th Avenue, Flushing 54, New York

Motion to inspect the Grand Jury minutes or in the alternative to dismiss indictment herein is denied. This Court, after reading the Grand Jury minutes, is satisfied that the evidence submitted is sufficient to sustain the indictment. Submit order.

JAMES L. DOWSEY, JR.
County Judge

COUNTY CLERK'S OFFICE, )
STATE OF NEW YORK, ) SS:
COUNTY OF NASSAU )

I, HAROLD W. McCONNELL, Clerk of the County of Nassau and of the Supreme and County Courts, Courts of Record, do hereby certify that I have compared the annexed with the original MEMORANDUM FILED in my office Dec. 14, 1965 and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court May 29, 1968.

/s/ Harold W. McConnell
Clerk

[SEAL]

COUNTY COURT : COUNTY OF NASSAU

Indictment No. 20122

THE PEOPLE OF THE STATE OF NEW YORK

*-against-*

SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, DEFENDANTS

## NOTICE OF MOTION

SIR:

PLEASE TAKE NOTICE, that upon the annexed Affidavit of IRWIN L. GERMAISE, ESQ., sworn to the 25th day of October, 1965, and upon the Petition of Norman J. Levy, Esq., Assistant District Attorney of the County of Nassau, which Petition was signed the 30th day of June, 1964, and upon the Order of Interception, signed on July 1, 1964 by Hon. Harold Spitzer, former Judge of the County Court of the County of Nassau, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at Special Term, Part I thereof in the County Courthouse, Old Country Road, Mineola, County of Nassau, on the 10th day of November, 1965 at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an Order declaring unreasonable, illegal and void the interception of telephonic communications which was carried out pursuant to an Order of Hon. Harold Spitzer, former County Judge of Nassau County, which Order was signed on July 1, 1964, and for an Order precluding the District Attorney from using as evidence upon the trial of the Indictment herein, the fruits of such intercepted telephonic communications obtained during the course of, or as a result of, the said unreasonable, illegal and void interception.

PLEASE TAKE FURTHER NOTICE, that pursuant to Section 813-C of the Code of Criminal Procedure, coun-

sel will move for a Hearing herein upon the foregoing matters, and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
October 25, 1965

Yours, etc.

/s/ Irwin L. Germaise
IRWIN L. GERMAISE
Attorney for Defendant
Thomas R. Kaiser
Office and Post Office Address
31 Broadway
New York 7, New York
Telephone: WOrth 4-5180

TO: HON. WILLIAM CAHN
District Attorney
County of Nassau
County Court
County Courthouse
Old Country Road
Mineola, New York

WARREN DOOLITTLE, ESQ.
Assistant District Attorney
County of Nassau
Of Counsel

* * * *

COUNTY COURT : COUNTY OF NASSAU

Indictment No. 20122

THE PEOPLE OF THE STATE OF NEW YORK

*-against-*

SALVATORE GRANELLO, also known as Sally Burns, DINO CONTE, also known as Dino Harris, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, DEFENDANTS

## AFFIDAVIT

STATE OF NEW YORK )
) SS.:
COUNTY OF NEW YORK )

IRWIN L. GERMAISE, being duly sworn, deposes and says:

That he is the attorney for defendant Thomas R. Kaiser in the within action and makes this Affidavit in support of the relief requested herein.

That it is settled law in the State of New York that "wire tapping" may be permitted only upon a showing of "probable cause" that crime has been or is being committed. *Section 813-A, Code of Criminal* Procedure.

That the standards for the issuance for a "wire tap" order are none less than those for an issuance of a search warrant. "Probable cause" for issuance of a search warrant exists where there is reasonable ground for suspicion which is supported by facts and circumstances strong enough in themselves to warrant a cautious man in the belief that the law is being violated. The Petition of Norman J. Levy, Assistant District Attorney of the County of Nassau, upon which the Order permitting the interception which is the subject of this Motion was based, does not have any supporting facts or circumstances with respect to the reasonable ground or "probable cause" for the Order to have been entered. (Copies of the Petition and Order are annexed hereto and made a part hereof.)

This is an insurmountable element which must be present for the Order to be signed. Under the Fourth and Fourteenth Amendments to the Constitution of the United States, a search warrant (similar to an Order for interception), may not be issued unless sufficient evidence is presented to the signing member of the Judiciary for a determination by him that "probable cause" exists. It is insufficient in law to grant an Order for the interception of telephone communications where the applying official merely states that "he has received reliable information from a credible person and he believes that a crime is being committed or information concerning crimes will be ascertained by the interception of certain telephonic conversations". Evidence obtained as a result of an interception based upon an Order issued upon such an Affidavit is inadmissible and a conviction based upon such evidence must be reversed. *Aguilar* v. *The State of Texas, New York Law Journal, June 23, 1964.*

In a motion for suppression of evidence obtained under a search warrant, it was held, that where the affidavit supporting the search warrant does not allege facts which arise above mere suspicion that the crime was being commited on the premises, the Court reviewing the propriety of the warrant, may vacate it, since the affidavit upon which the search warrant was predicated did not show reasonable ground for belief of guilt of the offense. A defendant, under such circumstances is entitled to have the evidence returned to him. *C.C.P. Sec. 783; People* v. *Coscia, 42 Misc. 2nd 978, 250 N.Y.S. 2nd 308.*

The Court of Appeals of the State of New York, held that, "Where defendants were convicted of bookmaking, an affidavit alleging that police officers observed several allegedly known bookkeepers to enter on various occasions a private dwelling wherein there were located two unlisted phones, did not disclose a 'probable cause' for the issuance of a search warrant on the ground that the dwelling was being used for bookmaking and the conviction was reversed." *People* v. *Fino, 14 N.Y. 2nd 160, 250 N.Y.S. 2nd 47.*

That it is clear from a reading of the Petition of Norman J. Levy, which Petition sought the Order of Inter-

ception pursuant to which "wire tap" activities ensued, which activity is moved against herein, that nothing beyond suspicion was set forth for the consideration of the signing Judge, and this is insufficient to sustain the Order and to permit the use of that which was obtained or learned as a result of the activity based upon this improperly signed Order. It is well settled that evidence subsequently obtained as a result of an improperly granted Order cannot retroactively serve in and of itself as the "probable cause" for the granting of the Order.

That it is noted that the Order of Interception herein, is a mimeographed form and has printed thereon the following: "Upon the annexed Petition of (typewritten name of 'Norman J. Levy' typed in here) and the sworn testimony of (typewritten name of 'Norman J. Levy' typed in here) there is reasonable ground to believe that evidence of crime may be obtained by intercepting telephone communications being transmitted over telephone instrument . . . ."

Your deponent respectfully requests a Hearing herein pursuant to *Section 813-C of the Code of Criminal Procedure* so as to ascertain whether or not there actually was "sworn testimony of Norman J. Levy," or merely the mimeographed form stated so, for if there was not, the Petition is patently insufficient to support an Order for the interception of telephonic communications. On the other hand, if such "sworn testimony of Norman J. Levy" was given to support the granting of the subject Order, the content and quality of such testimony is subject to examination so as to ascertain whether or not the said testimony was sufficient to show "probable cause" for the granting of the Order.

That in the absence of a Hearing as requested hereinabove and in the absence of a disclosure of whether or not there was "sworn testimony of Norman J. Levy", and if so, whether such "sworn testimony" was sufficient to sustain the granting of the Order herein, the patent lack of factual allegations make the mere Petition seeking the Order of Interception insufficient to establish the "probable cause" necessary for the granting of the Order, and as such this Motion to suppress should be granted. This

is claimed upon the authority of *People* v. *Cohen*, *42 Misc. 2nd 403*, *248 N.Y.S. 2nd 339*.

WHEREFORE, your deponent respectfully requests that an Order be granted herein, declaring unreasonable, illegal and void the interception of telephonic communications which were carried out pursuant to an Order therefor signed by Hon. Harold Spitzer, former County Judge of Nassau County and signed on July 1, 1964 and for the suppression of any matter obtained as a result of such Order, and it is respectfully requested that a Hearing be ordered herein with respect to the foregoing, and for such other and further relief as to the Court may seem just and proper.

/s/ Irwin L. Germaise
IRWIN L. GERMAISE

Sworn to before me this
25th day of October, 1965

/s/ Loretta Schobe
LORETTA SCHOBE

Notary Public, State of New York
No. 24-3528560
Qualified in Kings County
Commission Expires March 30, 1967

* * * *

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF

*v.*

SALVATORE GRANELLO, Also Known as SALLY BURNS, DINO CONTE, DINO HARRIS, THOMAS R. KAISER, JOHN DOE, RICHARD ROE, JOHN ROE and DANIEL ROE, DEFENDANTS

* * * *

*Irwin L. Germaise* for Thomas R. Kaiser, defendant.
*William Cahn, District Attorney*, for plaintiff.

JAMES L. DOWSEY, J. Defendant, Thomas R. Kaiser, moves for an order declaring unreasonable, illegal and void the interception of telephone communications pursuant to an order signed on July 1, 1964 by the HON. HAROLD SPITZER, former County Judge of Nassau County; and further, for an order precluding the use of evidence upon the trial of the indictment, the results of the telephonic communications.

The order signed on July 1, 1964 was done in compliance with section 813-a of the Code of Criminal Procedure of the State of New York, which provides, in part, that "An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal llaw may be issued by any * * * judge of a county court * * * upon oath or affirmation of a district attorney * * * or of an officer above the rank of sergeant of any police department of the state or any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order, the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application."

The defendant seeks a hearing to determine whether the information submitted to the court was legally sufficient to support the ex parte order.

The defendant, in requesting a hearing is attempting to convince this court that a close analogy exists between the ex parte order authorizing the interception of a telephone communication pursuant to section 813-a of the Code of Criminal Procedure, and the issuance of an order for a search warrant, pursuant to section 793 of the Code of Criminal Procedure. A search warrant is issued upon facts and circumstances which permit the signing Judge to conclude that "probable cause" exists. A wiretap order, as explained herein, is issued upon "reasonable ground to believe that evidence of crime may be thus obtained". In the case of a wiretap, the Judge issuing the order has the authority by the statute to examine on oath the applicant and the witnesses he may produce, and he invariably does so to satisfy himself of the existence of reasonable grounds for the granting of the ex parte wiretap order, and in doing so, a consensus has developed, that sound discretion can only be exercised if the criteria of proof required to establish "reasonable ground" in the issuance of an ex parte wiretap is tantamount to the stringent requirement of probable cause that exists in the issuance of an order for a search warrant. The analogy ends right there, however. Section 807 of the Code of Criminal Procedure provides for contravention of a search warrant to test the grounds of probable cause upon which it was issued; there exists no analogous provision in the Code of Criminal Procedure to contravene the issuance of an ex parte wiretap order; an inherent right does not exist in one whose telephone is tapped pursuant to section 813-a to determine by a hearing whether or not the judicial discretion of the Judge, which issued the order, was properly exercised.

It has been the policy of this court in the absence of legislative fiat in permitting a hearing concerning issuance of wiretap orders, similar to the type of hearing held to test the issuance of search warrants pursuant to section 807 of the Code of Criminal Procedure, to presume that the Judge, who issued the order, exercised sound dis-

cretion and that the ex parte wiretap order was issued upon the sufficient proof required.

It is conceded, however, that in the context of special circumstances, a court, in the absence of specific statutory authority, has the inherent power to review wiretap orders where the interest of justice mandates; no such compelling reason has been set forth by the defendant in the instant case.

CPLR 4506 provides that evidence obtained by means of eavesdropping without a court order shall be inadmissible in criminal proceedings.

This exclusionary rule does not apply to authorized wiretaps by court order issued under section 813-a of the Code of Criminal Procedure.

Section 813-a does not violate any provision of the Federal Constitution. The United States Supreme Court has held in *Olmstead* v. *United States* (277 U.S. 438) that telephone wiretapping does not violate the Fourth or the Fifth Amendment.

Section 605 of title 47 of the United States Code (Federal Communications Act of 1934) prohibits "interception" and "divulgence" and such wiretap evidence is therefore inadmissible in Federal courts. In *Nardone* v. *United States* (308 U.S. 338) the court stated that evidence obtained by wiretap shall not be used at all. Does the Federal exclusionary rule apply to State criminal prosecutions? The Supreme Court in *Schwartz* v. *Texas* (344 U. S. 199) stated it did not. Later in *Benanti* v. *United States* (355 U. S. 96) the court intimated that Congress would frown upon State legislation that was inconsistent with section 605; any contradiction would violate the public policy implicit in the Federal prohibition.

In *Pugach* v. *Dollinger* (277 F. 2d 739, affd. without opn. 365 U. S. 458) the court stated that a police officer who taps a telephone, even though authorized by a State court order, when he divulges same, a Federal crime is committed. An attitude is developing in State courts against "use" or "divulgence" of wiretap evidence based on this rationale. See *Matter of Interception of Tel. Communications* (9 Misc 2d 121) decided January 2, 1958, stating that all wiretaps, whether authorized by section 813-a of the Code of Criminal Procedure or not, are illegal.

In spite of this history concerning wiretap evidence, the policy of this court is guided by the perspective evolving from the 1938 Constitutional Convention prohibiting wiretapping without court order (art. I, § 12); in 1942 the ban was implemented by the enactment of section 813-a of the Code of Criminal Procedure authorizing use by court order; and an exclusionary rule, by CPLR 4506, of unauthorized wiretaps. It is to be noted from this history that no statutory provision exists for a pretrial motion to suppress, of the type presently before this court.

In *People* v. *Cohen* (41 Misc 2d 158) a hearing was demanded and rejected; the defendant's appeal was dismissed by the Appellate Division (N. Y. L. J., April 18, 1963, p. 16, col. 5) and leave to appeal to the Court of Appeals was denied both by FULD, J., on July 10, 1963 and by the court *en banc* (13 N Y 2d 595); see *People* v. *Scardaccione* (41 Misc 2d 433).

On February 25, 1964 in *People* v. *Cohen* (42 Misc 2d 403) it was held on a reconsideration of the motion to suppress, that the prior denial was solely on procedural grounds, and that the court had the inherent power of vacating a wiretap order if perjury or error be shown in the original suporting affidavits or for any other cogent reason; the court employed section 813-c of the Code of Criminal Procedure to suppress wiretap evidence based on the interpretation that it was the legislative intent of State compliance with Federal constitutional search and seizure requirements pursuant to the mandate of *Mapp* v. *Ohio* (367 U. S. 643).

This court disagrees with such pragmatic elasticity of interpretation of section 813-c; if this type of subjectivity were to prevail by all Judges of courts of original jurisdiction, chaos would reign in the administration of justice; uniformity and consistency can prevail only if courts of original jurisdiction refrain from usurping the appellate and legislative functions.

In an appeal from the order dated March 13, 1964 involving *People* v. *Cohen* the Appellate Division (24 A D 2d 900) found that although sufficient consent was not forthcoming to support the search without a warrant and not incidental to a lawful arrest, that the affidavits sup-

porting the wiretap order were sufficient. Then, by way of dicta, the court intimated that the wiretap order was the proper subject of judicial review by utilizing the same procedural mechanics utilized with respect to warrants for search and seizure.

If the implications of this decision are to be followed by this court without becoming mired in a quandary, the Legislature, without delay, should define by statutory procedure the mechanics to be followed in conducting such judicial review, and more importantly, to provide a uniform standard at to what constitutes "reasonable ground to believe evidence of a crime may be thus obtained"; this will produce a record of the facts subject to later judicial review; require filing with the issuing Judge the results of each order in the form of a return; and last but certainly not least, provide for filing of the order and return with the Clerk of the court with provision that same be made available to defense counsel, to enable him to controvert the factual basis upon which the order was issued; only then will a semblance of due process arise from the chaos and uncertainty that now exists.

The Court of Appeals in *People* v. *Dinan* (11 N Y 2d 350) has reaffirmed the policy adopted in *People* v. *Variano* (5 N Y 2d 391); *People* v. *Dinan* (7 A D 2d 119, affd. 6 N Y 2d 715) based on the power reserved to the States, as enumerated in *Schwartz* v. *Texas (supra)*, that wiretaps do not infringe constitutional immunities against unreasonable searches and seizures (*Olmstead* v. *United States, supra*). The court further stated that although *Benanti, Nardone* and *Schwartz* held the means of obtaining such evidence illegal, the State forum should decide as a policy measure whether the exclusionary rule of section 605 of the Federal Communications Act should be implemented. The highest court of this State, as a matter of policy, has chosen not to exclude such testimony. This court is, therefore, bound to adhere to the policy promulgated in *People* v. *Dinan (supra)*.

This court, although denying a pretrial motion to suppress wiretap evidence, does not preclude a possible exploration of the underlying basis of reasonable grounds that existed at the time the ex parte wiretap order was issued, in the course of the trial as a condition precedent

to establishment of the proper foundation to introduce the wiretap evidence under normal rules of evidence; this court is of the opinion that due process requires such an examination.

Only the future legislative or appellate process can determine and redefine whether the protection of the Fourth Amendment can be interpreted to encompass the proprietary interest of a person's words or phrases in the context of discourse in a phone conversation and for the purposes of uniformity, promulgate the procedural mechanics of testing pretrial the basis upon which ex parte wiretap orders were signed. Until such an eventuality, the court is limited to implementation of the law as it currently is interpreted, without entering the domain of the appellate process in search of novel contemporary legal truths. It is therefore ordered that the application is denied.

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Entered, Dec. 13, 1965,

Franklin H. Ornstein, County Clerk of Nassau County.

/s/ James L. Dowsey
C.J.

Dated December 13th, 1965

COUNTY CLERK'S OFFICE, )
STATE OF NEW YORK, ) ss:
COUNTY OF NASSAU )

I, HAROLD W. McCONNELL, Clerk of the County of Nassau and of the Supreme and County Courts, Courts of Record, do hereby certify that I have compared the annexed with the original ORDER FILED & ENTERED in my office Dec. 13, 1965 and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court May 29, 1968.

/s/ Harold W. McConnell
Clerk

[SEAL]

COUNTY COURT: NASSAU COUNTY

PART II

Ind. # 20122

THE PEOPLE OF THE STATE OF NEW YORK

*- against -*

THOMAS R. KAISER, DEFENDENT

Mineola, New York
May 31, 1966

BEFORE:

HON. ALBERT A. OPPIDO, County Court Judge, and a jury.

APPEARANCES:

WARREN M. DOOLITTLE, ESQ., Assistant District Attorney for the People.

F. COURTS BOUSE, ESQ., for the defendant.

M. WOWK
HAROLD F. X. MCGRATH
Official Court Reporters.

[the Following Occurred in the Absence of the Jury Panel]

* * * *

[15] MR. BOUSE: Well, can the defendant make this further motion: that under the McCall case he be allowed a hearing on any wiretaps that the district attorney intends to introduce into evidence.

THE COURT: Well, yes, but that is going to be—I understand—I don't know, I don't know whether or not there are any to be presented. Are there?

MR. DOOLITTLE: I'll make a statement, your Honor, relative to that. Yes, I would say the core of our case in the proof of this conspiracy and of the particular acts

involved in the conspiracy will be as a result of taped recordings. Now, these taped recordings came about by three sources, really. One was a bug in an office, in the [16] office of Irving Holzman who is the intended victim of the attempted extortion and a conspiracy, so I don't think there is any question that anybody is entitled to any hearing on that bug.

There are taped recordings of telephone conversations which were made of Mr. Irving Holzman—again the intended victim. He gave consent to the law enforcement authorities to monitor his telephone conversations which were had with Granello, I think it is Granello, one of the co-conspirators. On those particular conversations, with the process of it being a monitored phone conversation, I don't think there is any authority whatsoever for the defendant to have any McCall hearing on that. As to other conversations, there are conversations I believe involving Conte and Kaiser. These are taped recordings of wiretaped conversations pursuant to a court order of this court which were made on the Headline Club which is a club in New York City. Now, these taps were put on pursuant to a court order. Thomas Kaiser is not a subscriber to the telephone which was tapped, he is not an officer of the Headline Club, he has no interest whatso-[17] ever. The conversation in which his testimony or his telephone conversations will be presented are actually conversations that he made from an outside phone in to this Headline Club or which were made from the Headline Club to him.

We also have another telephone tap on a Patrissy's Restaurant which this defendant is not a subscriber to their telephone, he is not a privy in any way whatsoever to the corporation that owns Patrissy's Restaurant. He has no interest whatsoever and he himself is not on that particular phone call.

THE COURT: Well, you see, Mr. Doolittle, I'll have to make specific rulings on each one of these taps.

MR. DOOLITTLE: Right.

THE COURT: So, as a result, right now will you take them seriatim and put them in the record and I will have decisions on each one of them.

MR. BOUSE: Well, your Honor, I should think at this point, and particularly in the light of Mr. Doolittle's [18] remarks that the hearing should be held so that your Honor can determine the fault of what Mr. Doolittle says, —what he says, of course, is not evidence with regard to these taps—so that you can determine who is the subscriber and what the warrant said. I mean, this is all very conclusory as far as Mr. Doolittle is concerned.

THE COURT: But before we get into that I would like on the record some identification of the number of taps so that from that I will proceed to follow a definite procedure. Obviously I am not going to be able to follow any procedure until we first have into the record the number of taps, who made the taps, where the taps were made, the time of the tap and whether or not it comes within the purview of People versus McCall or any of the statutes. And then from that we will give you an extensive decision in which the record will be protected for yourself and for the district attorney. All right.

* * * *

[23] MR. DOOLITTLE: But when I'm talking wiretaps to Laymen, I'm talking just about that, I'm talking about a taped recording of a telephone conversation. I'll be a little clearer to the jury now knowing that we don't want to get our nomenclature mixed up. I'm talking about monitored telephone conversations. As to those I'm sure Mr. Bouse concedes that he has no right to any hearing whatsoever on those. As to a bug which may be placed in a room which in turn is connected to a tape recorder, I'm sure under those circumstances where I can establish the person gave consent for the bug, and I'm saying that as an officer of this court, Mr. Bouse says I'm not under oath, but in effect I'm under oath when I'm telling the Court as a prosecutor what I intend to put. As to that bug, I think Mr. Bouse can also or probably [24] have to concede that legally he is not entitled to any inquiry at all on that. The only inquiry he's entitled to as to those particular tape recordings is whether or not the continuity has been established and whether or not those tape recordings actually reflect the conversation as

it existed. In other words, he can attack the credibility of those tapes and that's it.

Now, as to these two conversations, two or three, it is possibly one on Rocky Graziano which may or may not be played—in fact, it will be played, I'm pretty sure, but it affects Granello, and in affecting Granello because this is a conspiracy it is going to affect this man because it's a conversation made during the course of the conspiracy by what the People contend is one of the co-conspirators as to that conversation which is on Patrissy's Restaurant, and I say this as an officer of the Court only on Patrissy's Restaurant, not on any phone of Thomas Kaiser's, not on any phone subscribed to be any of the defendants in this case, as the other taps, the other two wiretaps, all pursuant to court order on the Headline Club in which none [25] of these defendants have any proprietary interests, and certainly this defendant does, I don't see how under any stretch of the imagination he is entitled to any inquiry on that.

* * * *

MR. DOOLITTLE: Now, may I just go one step further, your Honor, and I'll apprise the Court of the procedure in which the People intend to follow to put not only this monitored taped conversations into evidence and the bug but also the recorded wiretap pursuant to the Court order. I intend to have them physically marked for iden- [26] dentification. I intend before I put the substance and the core of the case in, I intend to lay a foundation through various expert witnesses as to the continuity of these tapes. At that point I'm not going to put them in evidence because they can't be placed in until they have some sense in the context of the statement of Irving Holzman who will be the key witness. It is while Irving Holzman is on the stand that I will offer it at that point to put them into evidence, but of necessity, Your Honor, they will have to be referred to as exhibits for identification by other witnesses on the stand before I ultimately put them in evidence. So I want to be perfectly candid with the Court as to procedure, I have to follow it, I have no other way to do it.

* * * *

THE COURT: One other point. As I understand, in the selection of the jury it is to be understood that you are not to use the word "wiretap" in the sense that wiretap is used.

MR. DOOLITTLE: Well, I'll use it as to these par-
[27] ticular conversations. I'll make it clear to the jury, and I think this is only fair.

THE COURT: No, I'm not going to let you use wiretap as we know wiretaps within the law until I have ruled on the admissibility of the wiretaps.

MR. DOOLITTLE: But, your Honor, you see, you are depriving not only myself but also this defendant of a very, very precious right. There may be one juror sitting in that jury seat who may have some sort of mental block against wiretaps, be it for them or be it against them, and if we can't inquire as to whether or not, regardless of what his personal feelings are, whether or not he will accept these into evidence if the Court permits them into evidence without putting his own interpretation on them.

THE COURT: Well, I'm making an analogy here, Mr. Doolittle, that if there were a confession in which we had a Huntley hearing and you are going to mention a confession to a jury, then ultimately the confession never gets to the jury, but he's heard confession in his mind and he keeps thinking about what happened to the confession, even though it is ruled inadmissible by the Judge,
[28] the word confession is in the mind of the jury. Now I'm making an analogy with the word "wiretap."

Now, it may very well be, it may very well be that if you feel you need this to be inquired into, the jurors on their selection, it may very well be that we will have to have the voir dire forthwith.

* * * *

[29] THE COURT: Now wait just a minute. So I can narrow the field. At this time all you are requesting is a voir dire. In essence, that's what it is, right On three wiretaps?

MR. BOUSE: I think it's two.

THE COURT: Well, you just said three.

MR. BOUSE: I think Mr. Doolittle said three.

MR. DOOLITTLE: Well, one is on Patrissy's phone. It has to do with a conversation by one Rocky Graziano with Sally Burns. It's during the course of the conspiracy and prior to the cessation of the conspiracy.

I might say this, your Honor, that the particular taps in which Kaiser is on is after the conspiracy has completed or ended and we are admitting these in the nature of admissions.

THE COURT: Wait. The only way that could be admitted if it is on the completion of a conspiracy is if it is [30] in furtherance of the conspiracy.

MR. DOOLITTLE: No, your Honor, any admission made by a co-conspirator at the conclusion of a conspiracy is admissible only as against that co-conspirator.

THE COURT: There is no question about that.

MR. DOOLITTLE: But it is clearly admissible. All of the admissions made during the course of the conspiracy as my understanding of the law is admissible against all co-conspirators, so that's why we have to put the statement of Granello in as being admissible against him.

I have no objection to giving him a voir dire on these particular tape recordings. The only problem is mechanically. That means I have to get my telephone man here, I have to go through all the evidence that I would have to go into, and I'm not prepared to do that. The Court will have to give me until at least tomorrow morning. I'd be afraid to start picking a jury but that's going to be one of the main questions I'm going to ask of the jurors. I just submit he has no standing here to oppose them anyhow.

[31] MR. BOUSE: As a matter of fact, your Honor, the very point that Mr. Doolittle makes about the defendant's position on those taps are the points that we are going to raise during the voir dire as to their admissibility against him, so I think your Honor will of necessity have to have a voir dire.

* * * *

[32] (The following occurred in the absence of the jury panel):

THE COURT: Now, I made up my mind as far as the question of the hearing on the wire tap. I am having the hearing first. That's it.

Now, it seems to me I am not going to allow anything to get into this trial which would in any way cast any question. When I impanel the jury on the voir dire, I want it to be first legally ruled upon by myself whether it is admissible or inadmissible, which will be the subject of a hearing first.

[33] MR. DOOLITTLE: Well, as I understand the [34] McCall case, maybe we had better get the ground rules squared away before we proceed because it is a novel sort of hearing.

* * * *

THE COURT: Well, I don't think there is any real [35] problem on it. I think you are all familiar with the case and I think the burden is upon you to show that the affiant, who made the affidavit, as the predicate for the issuance of the court order, put him on and let him testify as to what knowledge he had, subject to cross-examination, and at that time then further inquiry if other problems arise in the light of the decision, whether there are any allegations by the defendant as to whether or not any of the statements in the affidavit are perjurious. Then of course the burden will shift to the defendant to prove if that is or not. Whether there is any perjury embodied in it. I think the procedure is clear.

* * * *

[37] MR. DOOLITTLE: Your Honor, it is possible I may want tomorrow to argue against the giving of the hearing again because I don't know whether I may—

THE COURT: But be ready.

MR. DOOLITTLE: I'll be ready. I may try and dissuade the Court, or persuade the Court, not to proceed with the hearing. However, I will be ready to proceed with the hearing in any event.

THE COURT: Mr. Doolittle, it is just common sense to me that if you are going to plant a seed in any juror,

of the question in your voir dire, of a wire tap before you have a wire tap hearing, and assume for the sake of arguendo, for argument, that I would rule both wire taps inadmissible, meanwhile you are impaneling a jury and talking about wiretaps and I don't care by any legerdemain how you would do it, you couldn't wipe that out of their minds no matter what you did. I am going to make [38] sure that before the voir dire of the jury is selected, this jury is actually impaneled and sworn, either the wire taps are admissible or inadmissible and then if they are admissible I will let you talk about the wire taps and if they are inadmissible I won't let you talk about them.

MR. DOOLITTLE: Your Honor, I agree 100 percent with the Court's reasoning. Just one thing I want to leave the Court with, to sort of wrestle with this tonight, whether or not this defendant, Thomas R. Kaiser, is entitled to attack this.

THE COURT: Look, because he has a proprietory interest

MR. DOOLITTLE: Because he has no proprietory interest.

THE COURT: I wouldn't hold that.

MR. DOOLITTLE: He isn't even talking on this telephone that is being tapped.

THE COURT: I wouldn't care whether he has a proprietory interest or not, I am going to give him the hearing.

MR. DOOLITTLE: I will probably make another application. I will be ready to proceed.

[39] THE COURT: I can't see any logic in that, whether he has a proprietory interest or not. If this is a subject of evidence, it is going to be introduced and I think he is entitled to have a hearing to inquire into the probable cause of the tap.

MR. DOOLITTLE: I think in the McCall case it was either a subscriber or someone who had a proprietory interest.

THE COURT: I see what you are saying, but I think the law is coming around to—you see, what you are saying in order for him to exercise that right he would have

to have a proprietory interest, that is what you are saying.

MR. DOOLITTLE: I wouldn't dare guess what the Supreme Court of the United States is going to say but—

THE COURT: You mean you are just going to apply common sense.

MR. BOUSE: May I also leave you with a thought, if it is being used against him, according to the prosecution, it is the only thing they have and he has some kind of a vague interest in its outcome, it seems to me, whether you [40] call it proprietory or not.

THE COURT: You have already won your battle, I don't know what you are arguing about.

MR. BOUSE: He is leaving you with a thought and I don't want it to become an overpowering thought.

THE COURT: All right, tomorrow morning, gentlemen.

* * * *

[H 2*]

## MINUTES OF WIRETAP HEARING

(The courtroom was thereupon cleared of all jurors.)

THE CLERK: People versus Thomas Kaiser. Case continued.

MR. DOOLITTLE: Your Honor, I would like to make a statement for the record before we proceed, if I may.

THE COURT: Yes.

[H 3] Let the record reflect here and now that the purpose of this hearing is to establish the admissibility or the inadmissibility of an offer of wiretaps. I have set out a procedure that I think I will follow and I am going to follow. Number one, I will determine the admissibility of inadmissibility before the impaneling of any jury and having been apprised of the offer by the district attorney

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[* The excerpts of the Wiretap Hearing are placed here in their proper chronological order. In transcribing the Hearing minutes, the Court Reporter paginated and bound them separately from the minutes of the trial proceedings. The Hearing minutes are here designated by an "H" preceding the original page designation.]

in the presence of defense counsel, as to which taps he is going to offer, of course, examined the order and all other papers and upon examination the Court has found that the orders that are the subject of this hearing were issued by a former Judge of the County Court, Judge Harold Spitzer. Obviously then it could not be forwarded to the Judge who issued the order which would be preferable under the McCall ruling to have him vacate that order or sustain it, depending on whether or not the probable cause or reasonable cause for the issuance of the wiretap was there.

Accordingly the record now reflects that I am determining de novo whether or not there exists reasonable cause for the issuance of the two wiretap orders; more specifically as to two telephone numbers. Do you want to put those in the record now?

[H 4] MR. DOOLITTLE: Yes, your Honor. One of them is 212—that is Code 212 LW 4-2523.

THE COURT: And the other one?

MR. DOOLITTLE: And the other one was on 212 numbers. One tap was on 212 numbers, Code 212 CA 6-8509 and 212 CA 6-8854.

THE COURT: Just for the record, so that there can be a little more distinction, the LW number is the Headliner Bar?

MR. DOOLITTLE: The Headliner Bar or is it the Headliner Club? Either the Headliner Bar or the Headliner Club.

THE COURT: And the other?

MR. DOOLITTLE: The others are on Patrice's Restaurant, both of them, in New York City, in the Borough of Manhattan.

THE COURT: Now, I don't know what you intend to do, Mr. Doolittle, but I am going to set this course for you: I am going to direct you, since a hearing has been requested by this defendant, that you turn over to him the affidavit which was the predicate for the issuance of the wiretap together with any other supplemental information which was taken by the Judge in relation to the [H 5] issuance of this wiretap and also that the subject wiretaps be identified so that if and when I rule on the

admissibility the record will reflect which ones are being the subject of my ruling.

All right, now we can proceed. Now do you wish to make a statement?

MR. DOOLITTLE: Yes, I would like to make a statement on procedure, your Honor.

THE COURT: Yes?

MR. DOOLITTLE: What procedure is to be followed? I agree—I was going to offer into evidence, at least have the Court take judicial notice of the Court Order together with the affidavits which I think this Court would have to do because it is an Order of this Court. In such event, of course, I was going to show it to Mr. Bouse. In addition to that I was going to put on the stand Donald J. White who was the confidential reporter who took down the testimony of Mr. Norman J. Levy, the Assistant District Attorney, who made the application and the affidavit before Judge Spitzer and through him I was going to offer into evidence a copy of the testimony which the Court has—

THE COURT: Either that way or state for the record [H 6] if Mr. Levy is available to identify the exhibit or in the alternative you can use the stenographer.

MR. DOOLITTLE: I think the stenographer would be the best evidence of it.

THE COURT: As long as you give me the foundation.

MR. DOOLITTLE: He is the one who transcribed it and he is the one who took it and also typed it himself.

THE COURT: That's all right, that would be all right, but the proper foundation has to be laid. I would like you to consider one other thought though.

MR. DOOLITTLE: Yes, sir.

THE COURT: If there is anything in your proof which will give an independent verification of what the person who related the facts to the affiant, I would suggest that you give that as part of your foundation.

MR. DOOLITTLE: Well now—

THE COURT: I understand that this is not the usual informer situation.

MR. DOOLITTLE: Not only that. May I be heard on that?

THE COURT: You can make a statement.

MR. DOOLITTLE: Yes.

THE COURT: Go ahead, I will allow it.

MR. DOOLITTLE: Especially in response to the [H 7] Court's suggestion, I know it is a suggestion because there are not guidelines whatsoever. This is probably the first such hearing that I am aware of in any Court that I know of, certainly none in this Court, which has been had on this particular procedure under the McCall case.

I would like to say this: I think what the Court is suggesting—I may be wrong—that not only the affiant be put on, but also one of the persons who might have given information to the affiant. This is what I seem to get from the Court's suggestion.

THE COURT: No.

MR. DOOLITTLE: If I do that I am going to try my whole case.

THE COURT: No; you don't. No.

MR. DOOLITTLE: I would like to say this—

THE COURT: I think you must have misunderstood me. You make your statement and then I will tell you.

MR. DOOLITTLE: I was going to say in view of the fact there are no guidelines and the only issue here is whether or not there was reasonable cause and reasonable grounds for issuing the eavesdrop order, now, I think in this particular instance the Assistant District Attorney, Norman Levy, was the affiant and he was also the testi- [H 8] fier before Judge Spitzer on the sworn testimony. He testified as to facts that were narrated to him by one Irving Holzman. There was not even an attempt to withhold the name because it was not an informer situation. This was Irving Holzman who was the victim of the alleged crime.

In adidtion to that I think the Court, having heard the testimony, he also stated that his investigation was not only based on what Mr. Holzman said, but on the fact that he himself had monitored certain conversations.

THE COURT: That is the point I am getting at.

MR. DOOLITTLE: But that is right in the testimony.

THE COURT: Yes.

MR. DOOLITTLE: If Mr. Levy takes the stand now—

THE COURT: But you didn't get my point.

MR. DOOLITTLE: I guess I didn't. I don't see what Mr. Levy can add to it.

THE COURT: I said to you since within the supplemental affidavit which was the subject of an independent inquiry by the Judge who signed the wiretap order, as I read this last night, I found that there were monitored phone calls, the monitoring of these phone calls were used as a predicate in the sense that it was given to the Judge who issued the order as a basis of an independent verifi- [H 9] cation of what Holzman told the affiant, that this monitored telephone call was a verification, an independent verification that this thing occurred.

MR. DOOLITTLE: Right. [THE COURT:] Now, what I am saying to you is this: If you wanted to present that as an additional verification or whether or not you wanted to rest upon the inquiry made by the Judge who issued the wiretap and place your reliance upon other verification, if any, in the supplemental affidavit, that is a choice for you to make, but I just wanted to bring to your attention that even though he is not an informer in the sense that we are thinking of, and under the decisional cases that have come out, there is a distinction here. This man is the victim and it is one step closer and obviously all that is needed then is some independent factual investigation or proof of the reliability of the victim's information to the affiant. In other words I am not talking about the reliability of the informer, I am talking about the independent investigation of what the victim said to the affiant. Now whether or not you want to rely upon what is in the sworn testimony taken by Judge Spitzer, I just thought I should bring to your attention to the [H 10] point that when I read this, I found that a monitored telephone call was used and was the basis of the Judge's evaluation of whether or not the victim was telling the affiant the truth or whether there was any verification.

MR. DOOLITTLE: Right. Now, may I follow along that line, your Honor? In effect, what you have is Levy testifying, assistant district attorney Levy testifying not only as to what Holzman told him, but to what his inde-

pendent investigation showed by monitoring of this telephone call. Now, to put him on the stand or to play that tap would not be our particular province. In other words the only issue here is was Norman Levy—if the defendant wanted a hearing, he has got to contend that that particular testimony of Levy was prejurious.

THE COURT: Well, that is the second stage.

MR. DOOLITTLE: Well, I mean—

THE COURT: There are two stages. First that the reasonable cause for the wiretap is issued, then if he takes the position as to whether or not what is embodied which is the predicate upon which the Judge issued the wiretap was prejurious, well, in that instance then the burden shifts and it goes to Mr. Bouse.

MR. DOOLITLE: Well, that is the way I feel. I feel [H 11] that the minutes of this particular hearing—not hearing—the ex-parte hearing before Judge Spitzer are sufficient reasonable grounds and that is what I was going to do.

THE COURT: I am not saying it isn't. I thought I would forewarn you so that if you wanted to present anything I gave you an opportunity since we are here channeling new bypasses and byways.

MR. DOOLITTLE: I just don't want to be in the position of rolling the dice and then finding out that really I rolled them the wrong way, so I think soundly—

THE COURT: I am not going to roll your dice for you.

MR. DOOLITTLE: I know that, Your Honor, but this being a novel situation and this being a matter in which there are no guidelines, I am actually going to present the minutes and that's it. I think that should be sufficient. I cannot see what Mr. Levy could contribute other than to go through all of his testimony in there.

THE COURT: All right, go ahead. You made your opening statement.

MR. DOOLITTLE: Right.

THE COURT: What do you wish to do?

MR. DOOLITTLE: All right, if your Honor please, I [H 12] am going to ask the Court to take judicial notice or I will offer in evidence the two respective Court Ord-

ers one for the interception of certain telephone conversations on 212- LW 4-2523, signed July 1st, by Harold Spitzer, Judge of the County Court of Nassau County, which order was effective up to the 29th day of August, 1964.

THE COURT: What date?

MR. DOOLITTLE: August, effective up to August 29, 1964, and it was signed on July 1st, 1964 and together with that particular exhibit, as part of that exhibit, I also would like to offer the petition of Norman Levy which accompanied the order.

MR. BOUSE: Your Honor, I presume—

THE COURT: Just a minute. What else are you offering with that?

MR. DOOLITTLE: I am going to offer them one at a time.

THE COURT: All right.

MR. BOUSE: I presume—

THE COURT: He is offering it and I will let you look at it. What do you want to say?

MR. BOUSE: I presume that these are being offered in evidence for the purpose of this hearing only?

THE COURT: Oh yes.

[H 13] MR. BOUSE: Inasmuch as their admissibility is in issue.

THE COURT: That's right. I haven't determined whether they are admissible or inadmissible yet. They are just being offered.

(The above-mentioned document was thereupon marked People's Exhibit 1 in evidence.)

MR. DOOLITTLE: I am going to offer—

THE COURT: Wait just a minute. It was offered. Do you have any objection for the record?

MR. BOUSE: Well, if it is for the purpose of this hearing only and we're going to determine its admissibility eventually, I have no objection. All right.

THE COURT: All right, fine. I just wanted the record to reflect that is so, so that the record is complete. All right.

MR. DOOLITTLE: I am offering as People's Exhibit 2 the Court Order in the matter of the application of Nor-

man Levy, an Assistant District Attorney of the County of Nassau, for an Order for interception of certain telephone communications 212 - CA 6-8509; CA 6-8854, which Court Order was signed by Judge Harold Spitzer of the County Court of Nassau County on July 1st, 1964, in wh' [H 14] said order was to be effective and in force until the 29th day of August, 1964.

THE COURT: Any objection?

MR. BOUSE: No, under the same conditions.

THE COURT: All right.

(The above-mentioned document was thereupon marked People's Exhibit 2 in evidence.)

MR. BOUSE: I assume you intend for me to get copies of these?

THE COURT: Well, you can look at them. I will give you time to look at them. Take them and look at them.

MR. DOOLITTLE: If I may just use them in the meantime, I want to put Mr. White on.

THE COURT: He is trying to get everything in and then we will let you have them, Mr. Bouse.

MR. DOOLITTLE: May I call Donald J. White to the witness stand, please.

THE COURT: Yes, please.

DONALD J. WHITE, reiding at 247 North Delaware Avenue, North Massapequa, L.I., New York, having been called as a witness on behalf of the People, was duly sworn and testified as follows:

MR. DOOLITTLE: Judge, I think you have my copies, [H 15] may I have them?

THE COURT: I beg your pardon.

MR. DOOLITTLE: I think you have my copies, may I have them back?

THE COURT: I don't know whether they are yours. No, I don't have your copies.

MR. DOOLITTLE: I gave them to Mr. Roberto last night.

THE COURT: The only copies I have are the carbon copies.

MR. DOOLITTLE: The originals. Yes. I would like to have them marked in evidence.

THE COURT: Where are the originals?

MR. DOOLITTLE: I don't know, wherever Judge Spitzer left his files, I don't know. There is no problem about the carbons being offered in evidence because if the man who typed them up himself is here—

THE COURT: All right.

DIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Mr. White, you are employed by the District Attorney's Office as a confidential reporter, is that correct?

A Yes, sir.

Q What are your functions?

[H 16] A As confidential reporter I report verbatim and transcribe the proceedings of the Grand Jurys of Nassau County and statements and other matters taken in connection with the District Attorney's investigations.

MR. DOOLITTLE: Do you concede his qualifications?

MR. BOUSE: Oh yes, no question.

MR. DOOLITTLE: For the record, Mr. Bouse advises me that he will concede Mr. White's qualifications.

Q Mr. White, did you have occasion on July 1st, 1964, to be present in Judge Harold Spitzer's chambers here in the County Court, together with Mr. Norman J. Levy, an Assistant District Attorney?

A Yes, sir.

Q Did Mr. Levy give certain sworn testimony relative to an application for an order for the interception of certain telephone communications?

MR. BOUSE: Now I am going to object to the leading nature of that, if your Honor please.

MR. DOOLITTLE: It is just introductory.

MR. BOUSE: He is concluding that it was sworn testimony.

THE COURT: All right, I will sustain it. Just ask him.

[H 17] Q Did he give certain testimony relative to getting a wiretap on the Headliner and Patrice's Restaurant?

A Yes, sir; he did.
Q Was that testimony sworn or was it not sworn?
A It was sworn testimony.
Q Who administered the oath?
A Judge Spitzer.
Q I see. Did you transcribe each and everything that was said after Mr. Levy was sworn from the beginning of his testimony until the completion of his testimony?
A Yes, sir; I did.
Q What did you take this on, a stenotype machine, sir?
A Yes, sir.
Q After you took it on the stenotype machine, what, if anything, did you do relative to that particular testimony?
A I brought the stenotype notes back upstairs to the office and transcribed it by means of a typewriter. When the typewritten statement was finished I compared it with the stenographic notes, then submitted it.
Q Now, I show you—
THE COURT: Did you check your stenographic notes against the transcript?
THE WITNESS: Yes, sir; your Honor.
[H 18] THE COURT: Did you find it to be accurate?
THE WITNESS: Yes, your Honor.
Q I show you this manuscript consisting of—how many pages is it, Mr. White?
A Thirty-four.
Q Are you familiar with that paper, have you seen that before?
A Yes, sir.
Q Is that the transcript that you made of the recorded notes relative to the testimony of Mr. Levy concerning the Headliner Bar?
A Yes, sir; it is.
Q That is a carbon copy, is that correct?
A Yes, sir.
Q You typed that yourself?
A Yes, I typed an original and two carbon copies.
Q Is that an accurate transcription of everything that was said from the time Mr. Levy got under oath until his testimony relative to the Headliner Bar was completed?

A Yes, sir; it is.

MR. DOOLITTLE: Offer that in evidence and I ask that it be marked People's Exhibit IA, if your Honor please, so it will have some relevance to People's Exhib-
[H 19] it 1.

THE COURT: Show it to Mr. Bouse.

MR. BOUSE: Your Honor, if there are no further questions, Mr. Doolittle has of this witness,—

THE COURT: Evidently, he has further offers.

MR. BOUSE: Let him offer them both and then we can have a voir dire and cross examination.

THE COURT: All right, fine. Instead of IA, mark it 3.

MR. DOOLITTLE: It is going to have some relevancy to People's Exhibit 1.

THE COURT: All right, fine, 1A.

(The above-mentioned document was thereupon marked People's Exhibit 1A for Identification.)

MR. DOOLITTLE: Ask that this transcript be marked People's Exhibit 2A for Identification.

(The above-mentioned document was thereupon marked People's Exhibit 2A for Identification.)

Q Mr. White, at the same time that Mr. Levy made an application for an intercept order on the Headliner Bar, did he also in your presence under oath make an application for an intercept order for Patrissy's Restaurant?

MR. BOUSE: May we have the date?

[H 20] THE WITNESS: July 1st.

Q July 1st?

A Yes, sir.

Q Was his narration of the facts, was that done individually or all done at once or one at a time, how was it done?

A It was one at a time. The original application was made and then the testimony and then another application was made and then the testimony from the first application was incorporated with the exception that on the second application after the testimony there was some colloquy and that was taken down.

Q Did you record everything, all the colloquy between the Court and Judge Spitzer—between Judge Spitzer and Mr. Levy?

A Yes, sir; I did.

Q Now, People's Exhibit 2A for Identification, is that an accurate, complete and accurate transcription of all the sworn testimony of Norman J. Levy, relative to the intercept order for the phones at Patrissy's Restaurant?

A Yes, sir, it is.

Q Did you type that yourself?

A Yes, this was prepared in the same manner, typed [H 21] from my stenotype notes, then compared for accuracy with the stenotype notes and then submitted. I found it to be accurate.

Q Incidentally, both People's Exhibits 1A and 2A for Identification are carbon copies, is that correct, sir?

A Yes, sir.

Q How many originals, what did you make, one original and how many carbons?

A One original and two carbons. However, there was an original on each number.

Q I see.

A So that there were two originals and four carbons but they were made separately.

Q I see.

A An original and two carbons on number one and an original and two carbons on number two.

Q Those carbons are both from the originals you typed yourself?

A Yes, sir.

THE COURT: So except for what is actually the telephone number on IA and IB—rather IA and 2A, the substance of both these are identical.

THE WITNESS: Yes, Your Honor.

[H 22] MR. DOOLITTLE: I offer them both in evidence, your Honor, and I have no further questions of Mr. White.

THE COURT: All right.

MR. BOUSE: May we have a short period to examine this?

THE COURT: Well, you see, the substance is not important, just whether—

MR. BOUSE: Well, it would seem to me that the sufficiency of the evidence that was received or the testimony that was received by Judge Spitzer would be important so it will be necessary for me to examine the testimony as it was offered to see if it was sufficient.

THE COURT: No, I don't see that at all.

MR. BOUSE: That is what the McCall Case—

THE COURT: All we're concerned with here, Mr. Bouse—

MR. BOUSE: Excuse me.

THE COURT: All we're concerned with here is whether or not it was taken and how it was taken. The substantive part of that has nothing to do with it at this time.

MR. BOUSE: You mean this particular witness?

THE COURT: Yes.

MR. BOUSE: But I may want to raise a question as to actually what did happen in there at the time and the [H 23] question may raise itself if I am allowed to peruse the exhibits.

THE COURT: I will allow you to look at them.

MR. BOUSE: That is all I want.

THE COURT: As to this witness, I don't see any materiality in going into the substantive aspect.

MR. BOUSE: Neither do I.

THE COURT: Except as to accuracy.

MR. BOUSE: Neither do I.

THE COURT: Or as to any of the foundations as to how it was taken or whether it was sworn or not. Of course you have unlimited inquiry.

MR. BOUSE: You are quite correct, his act was a mechanical act and that would be the only basis of my examination, but a question may be raised within the exhibits as they are offered as to the mechanics. It may not. Probably won't.

THE COURT: Go ahead and ask him.

MR. BOUSE: I just need about two minutes to look at them.

THE COURT: All right, go ahead.

[H 24] CROSS EXAMINATION

BY MR. BOUSE:

Q Mr. White, can you tell us who else was in the room, in the chambers of Judge Spitzer at the time that you were taking this testimony of Assistant District Attorney Norman Levy?

A Judge Spitzer, Mr. Levy and myself.

Q How long would you say this interview went on?

A I don't have any recollection of that. I guess maybe ten minutes.

Q And the testimony that you recorded would be partly given in narrative form by Mr. Levy with questions occasionally asked by Judge Spitzer, is that how it went?

A Yes, sir.

MR. BOUSE: I have no further questions.

THE COURT: All right, mark them, that goes for the two exhibits, Mr. Bouse. Mr. Bouse, any objections as to the two exhibits?

MR. BOUSE: No.

THE COURT: All right, mark them.

MR. DOOLITTLE: I have no further questions. Thank you, Mr. White.

THE COURT: You may step down.

[H 25] (People's Exhibits 1A and 2A for Identification were thereupon received and marked in evidence.)

THE COURT: All right, anything else?

MR. DOOLITTLE: Your Honor, I submit that the People have now established that there was reasonable ground but the introduction of this testimony and accordingly that is the People's case as far as the hearing is concerned.

THE COURT: All right. Now Mr. Bouse, I think you should be afforded an opportunity to read that.

MR. BOUSE: Yes, and Judge—

THE COURT: He is resting now so I am going to allow you to look through them, peruse them in the courtroom here and then I will give you a short recess. I do not want these to be taken out of the courtroom.

* * * *

[H 28] MR. BOUSE: At this time defendant Kaiser, keeping in mind your Honor's outline of what the purpose of this hearing was, to determine the admissibility of an offer of wiretaps and that your Honor is determining de novo the sufficiency—

THE COURT: Based on what is offered.

MR. BOUSE: Based upon what is offered, yes. The [H 29] defendant moves to suppress the wiretap evidence on the following grounds:—

THE COURT: Not to suppress it, to have it declared inadmissible is the proper term.

MR. BOUSE: To have it declared inadmissible on these grounds: Number one, the paper submittal in particular the petition of Mr. Levy is clearly insufficient under the McCall ruling.

Now first of all—

THE COURT: Tell me why you say that?

MR. BOUSE: Well, that is what I am getting to.

If your Honor would want one copy of this so that I can refer to it, I think they are similar and we can both be looking at the same matter.

The petition of Mr. Levy is a formal petition, as your Honor can readily determine, with some twelve or fifteen insertions.

Now of course this petition was made two years before the McCall case, but at any rate when Mr. Levy refers to his information and belief he does not state what information he has, you see. The McCall case says that makes a petition defective. He gives no reason in his petition as to why he believes the McCall case again [H 30] says that makes the petition defective. There is no factual statement of the affiant's experience with his informer's reliability.

Again, the McCall case says that makes a petition defective and finally there is no statement in Mr. Levy's petition as presented to Judge Spitzer of any factual showing of what was revealed to him to cause him to make the petition.

Finally, the McCall case makes the petition defective. So I think we can concluded that if the matter rested just on the petition, the petition of Mr. Levy, there would be

no question that there was no ground, no reasonable ground upon which to issue a wiretap order, albeit they were using the same petition as a form, but under the new McCall ruling they would be clearly insufficient today.

Now with regard to the other testimony that Mr. Levy gave before Judge Spitzer, it is completely hearsay from one Holzman. Now again the McCall Case says that there must be a factual showing of Levy's experience with his informer's reliability.

Here you have a convicted felon and I am sure your Honor is acquainted sufficiently with Holzman's background to know that at least the reliability of the informant might be in issue as far as any Judge would be [H 31] concerned who is going to sign an order based solely upon hearsay from Holzman through Levy to the Judge, that would be the minimum test that any inquiring Judge might make, but here we have the assistant district attorney in the Judge's chambers, with no one else and he doesn't present Holzman or Mrs. Holzman or anybody else to substantiate the allegations that he says Holzman told him.

Now, if you take these allegations at their best, at their absolute best, there is no showing that a crime was being committed either by Granello or Conte against whom the order is signed. There is absolutely no showing of that. There is a showing of an argument, there is some inuendo in there, but there is no showing that a crime is being committed or that there is an extortion or anything. Someone wants $25,000 for something to do with a business and that's it. There is something vague, some vague reference to Mrs. Holzman being knocked down by some unidentified persons who have as yet not been apprehended, but nothing to show that a crime was being committed or that a wiretap order would reveal evidence or give evidence as to that particular crime. And of course in line with that there is certainly no showing that Kaiser—and you will note that his name is very conspicuous by its [H 32] absence—was involved in any of this.

Now, it is again the contention of the defendant that Judge Spitzer, County Court Judge, had no jurisdiction to

sign any order affecting a phone out of his jurisdiction which would have been the County of Nassau. Here we have two Metropolitan phone numbers, the subjects of these tap orders.

Now finally, if your Honor finds that there was, after wading through the testimony of Assistant District Attorney Levy, if your Honor finds that there was reasonable ground to believe that a crime, some crime was being committed, there is no showing that that crime was being committed in the County of Nassau. If there was any extortion taking place and you want to construe the conversation that was related by Mr. Levy in Judge Spitzer's chambers, those conversations were all in New York at the Charles French Restaurant or some other place, but here we have a County Court Judge of the County of Nassau signing a wiretap order for two phones in Manhattan where, if any crime was being committed, it was being committed in Manhattan, that was clearly outside of his jurisdiction.

Now of course the orders, if you find that the orders [H 33] were properly issued and that there was sufficiency, which I think clearly there was not, but if your Honor finds that there was sufficiency, they are clearly inapplicable as far as the defendant Kaiser is concerned. He is not named on any of them. As far as he was concerned, it was the result of a fishing expedition and they just happened to pick up his call coming in to one of those numbers.

Now, if we follow Judge Desmond's philosophy in the McCall Case, where he concurred on different grounds, he believes all wiretaps are violative of the fourth and fifth amendment to the Constitution of the United States.

THE COURT: Now we're getting into something else.

MR. BOUSE: No, but if you want to go that far—.

THE COURT: Have you finished?

MR. BOUSE: No.

THE COURT: You see, you can talk about the constitutionality and Judge Fuld and Judge Desmond agree on this point as to what their opposition to the admissions of wiretap is, but I would rather have you continue at this point, if you will, on what you say are the in-

adequacies of the wiretap order and the affidavits which were the predicate, assume for the sake of arguendo [H 34] at this time that they are admissible because of the State Law, even though Judge Desmond and Judge Fuld may ultimately—their opinion may ultimately be the majority opinion. At the present time they are the minority opinion, you understand that.

MR. BOUSE: I understand that.

THE COURT: So if you confine yourself to any other arguments that you may have as to the inadequacies or the illegality of the wiretap, I would appreciate that.

MR. BOUSE: Well, I am going to refrain from attacking the wiretap as far as relevancy is concerned. I think we have a tap not in furtherance of a conspiracy admittedly by the prosecution, but allegedly showing admissions.

THE COURT: I didn't hear any such admissions, but go ahead.

MR. BOUSE: Well, I have been living with Mr. Doolittle on this case and I think somewhere I thought it was yesterday, but it may have been last week, where Mr. Doolittle indicated this tap was not in furtherance of the conspiracy, but an admission of having had a part in it. I think he made that yesterday, your Honor, before lunch.

THE COURT: I am not concerned with that now. All I am concerned with is whether the predicate for the [H 35] reasonable cause for the wiretap, whether or not there was reasonable cause to issue the wiretap.

MR. BOUSE: Yes, of course sufficient—just to sum it up and it is on those grounds that I have given your Honor that the petition of Norman Levy was insufficient. He didn't state the information, he didn't state why he believed the information and he didn't show the affiant's or his experience with the affiant's reliability and there was no showing in the petition as to what was revealed. Those are the grounds for the petition not being good. As far as the testimony is concerned, that has to met the same test. It is completely hearsay testimony from Holzman. No factual showing, no ground upon which the affiant says he relies on the story of Holzman and as a matter of fact Holzman becomes a questionable figure throughout this matter.

There was no showing that a crime was being committed by Granello and Conte. There was no showing that it was within this jurisdiction, if it was being committed, and fourth, we have the Judge signing the tap order for a jurisdiction other than his own. He was not a Supreme [H 36] Court Judge, he was a County Court Judge.

THE COURT: Let me ask you this: I am sure you are familiar with the McCall case. You see, the McCall case dealt with an informer and the question of the affiant's experience with the informer's reliability. They went into the question that there should be some factual showing, but here we have the victim who is relating this to the affiant, Mr. Levy. Now, I have given you an opportunity and I think it is the first time it has ever been done, of your being allowed to not only look at the basic affidavit of Mr. Levy, and I would say this very frankly to you, if this were the only thing I had in front of me, there is no question that it would be inadmissible, but we have in evidence 1A and 2A which is a complete supplemental inquiry by Judge Spitzer in which he went into and interrogated Mr. Levy as to whether or not—I call your attention specifically to whether or not he asked Mr. Levy whether or not he had made any independent investigations as to the assault upon Mrs. Holzman, you recall that.

MR. BOUSE: Yes, where it was said that it is under investigation, not that he made any—

THE COURT: But he said it had been checked out. [H 37] Also, Judge Spitzer said, he wanted to know what else and there was also the neighbor. Then you will recall there were these monitored telephone calls from the drug store, remember that?

MR. BOUSE: Yes.

THE COURT: That I think—and there are other instances—you see, here the Judge was inquiring for independent acts, observations and statements to give him an evaluation of the reliability of what Holzman was telling Mr. Levy. See, it is not a question of an informer and whether or not in the past he was reliable. It is just a question of whether the facts that Holzman told Levy were—or there were some credibility to that or independ-

ent checking. You see, within those exhibits, 1A and 2A, I find that.

Now, the only question, and I would like the district attorney to devote his argument to this, is there is some question raised about the authority of the Judge to sign a wiretap order for New York telephones. That is what Mr. Bouse is claiming.

MR. BOUSE: His jurisdiction is just County-wide, as far as I can see.

THE COURT: I beg your pardon?

[H 38] MR. BOUSE: May I make some comment on what your Honor said? It seems to me unreasonable—.

THE COURT: Didn't you just mention that to me?

MR. BOUSE: Yes.

THE COURT: Didn't you say that Judge Spitzer—didn't you just make the argument that he did not have authority to tap this wire?

MR. BOUSE: Correct.

THE COURT: Since it wasn't a Nassau County telephone?

MR. BOUSE: Correct. I did.

MR. DOOLITTLE: I have never heard that argument. It is a novel argument.

MR. BOUSE: This is a novel proceeding.

MR. DOOLITTLE: This is like saying a warrant issued by a County Court Judge cannot be executed in New York County.

MR. BOUSE: It is completely different.

MR. DOOLITTLE: Which is obviously false. This is an order of the County Court. It happens to be sitting in the County of Nassau where, as for example, a Grand Jury only has jurisdiction of crimes within this County, certainly the County Court of Nassau County on a change [H 39] of venue can try a crime committed in another county.

THE COURT: That is not what he is saying.

MR. DOOLITTLE: No?

THE COURT: That is not his argument.

MR. DOOLITTLE: I don't understand the restricted view that a Judge of this County, where a crime is apparently being committed in this County, alleged to be

partialy committed in this County and another County, in other words this was a conspiracy, this was an attempted extortion, which, of necessity, involved two counties.

THE COURT: I think it is academic. We have already had a recent decision where it is committed in two counties on the question of jurisdiction.

MR. DOOLITTLE: Right.

THE COURT: But he is not saying that. He wants to know from you and I want to hear from you what you have to say.

What he is saying is this: What authority did the County Judge have to issue a wiretap order on a phone that is in New York?

MR. DOOLITTLE: I say that is inherent in his power. If the facts before him show that he has some jurisdiction over the crime. The same thing would be true as I [H 40] say, of a Judge issuing a warrant.

THE COURT: In other words your argument is this: If the crime was partly committed in Nassau and partly in New York, then he has authority to issue a wiretap order on a New York telephone?

MR. DOOLITTLE: Right.

THE COURT: That is your argument?

MR. DOOLITTLE: Right. Yes.

HE COURT: First of all, in looking at this de novo, is this a New York telephone or is it not a New York telephone? Nobody has told me whether it is or not.

MR. DOOLITTLE: I think I specified that, your Honor, that the code number 212, which is New York City, that is the five boroughs of New York City—

THE COURT: There is nothing on the record that you are—

MR. DOOLITTLE: I am acknowledging that these taps were in the Headliner Bar in New York City and Patrissy's Restaurant in New York City, no question about that, no question about that at all. I say that is an inherent power of this Court where a crime is partially committed—

THE COURT: All right.

Now, what do you say to his argument? What do you [H 41] say is in Exhibits 1A and 2A?

Frankly, I tell you this exhibit 1 and 2, the affidavit of Mr. Levy, if they were the only predicate for the wiretap, of course as I said, the wiretaps would be inadmissible. The affidavit itself is inconclusive.

MR. DOOLITTLE: I concede that is precisely why we go through the procedure we do.

THE COURT: In other words the whole predicate is 1A and 2A.

Now, you tell me what independent observations, acts or investigations were made in either one of those exhibits which would lend some credibility to Holzman, in the light of what Mr. Bouse said, his questionable integrity and character and all that. He is saying that whether it is true or not doesn't make any difference.

MR. DOOLITTLE: That's right.

THE COURT: But he has made that assertion.

MR. DOOLITTLE: Well, it is a statement, your Honor. It is a statement at this point for the purpose of this motion without any foundation and only for the purpose of this motion. There is no evidence to substantiate that.

THE COURT: No question.

MR. DOOLITTLE: It well may be true, but in and of [H 42] itself—

THE COURT: He is not saying that he is the informer, he is saying that Holzman's testimony is incredible and without it being checked that there should be something wherein 1A and 2A, something in there to substantiate the credibility of what Holzman told Levy and I want to know from you what do you say is in 1A and 2A that gives that independent observation, independent factual showing that shows that there is some substance or truth to what Holzman has said. That's all.

MR. DOOLITTLE: I will answer that, your Honor, but may I just comment, your Honor, on the fact that the Court says that the affidavit in and of itself is not sufficient. I agree to that, but if you notice that printed order, we printed it up especially which says upon the annexed petition of Norman J. Levy and the sworn testimony—

THE COURT: I read that.

MR. DOOLITTLE: We, as a matter of practice, always put sworn testimony in when the Rackets Bureau comes in with an application.

Now, as to what additional evidence there is other than the statements made by Irving Holzman, there is the statement, the investigation of the assault—

[H 43] THE COURT: You want to delete it from the record? Look at 1A and 2A, just point out to me what you say there is.

MR. DOOLITTLE: There is the testimony of Norman Levy about the monitored phone call which he overheard between —

THE COURT: What is there about that phone call that lends credibility to Holzman's story?

MR. DOOLITTLE: I wil have to read it, it is a verbatim conversation.

THE COURT: You tell me in essence what it is.

MR. DOOLITTLE: In essence it was an attempt on that phone call, I think certainly it could be read into that phone call, an attempt to extort money from Irving Holzman. That, coupled with the facts narrated to Mr. Levy by Mrs. Holzman, the facts narrated to Mr. Levy as stated in here by Delores Billings, by Joey Albino, all of these facts indicate that there was sufficient reasonable grounds, your Honor, it just wasn't based solely and exclusively on the testimony of Mr. Holzman, on the statements made by Mr. Holzman.

This is unique in that, number one, you have a victim, not an informer. Generally, usually the case says all you [H 44] need is an informer and we must know him to be reliable, and that would be sufficient. Here far more work and investigation was done and it is all stated in here.

THE COURT: What else did you find there that you want to bring to my attention?

MR. DOOLITTLE: The fact that a neighbor had been examined and she corroborated. So therefore you get down to the credibility of Mr. Levy.

THE COURT: Go ahead.

MR. DOOLITTLE: I think that in substance is it.

THE COURT: Do you have anything else you want to bring to my attention? Those are the two things that I saw myself.

MR. DOOLITTLE: Well, I know the Court read this.

THE COURT: There is no question that I read it. I not only read the affidavit, but I read the supplemental inquiry by Judge Spitzer and went through it very thoroughly.

MR. DOOLITTLE: As I say, the statements made to Holzman by Mrs. Holzman, by Delores Billings, by Joey Albino, by the neighbor, to the attack on Mrs. Holzman, by his own independent monitoring of the telephone call [H 45] that was made and I think these are all—

THE COURT: Do you want to add anything else?

MR. DOOLITTLE: These involve the credibility of Mr. Levy himself.

MR. BOUSE: All the people who spoke of these particular attacks, none of these are crimes that were in any way connected with Granello and Conte, no probative effect.

THE COURT: Mr. Bouse, you know that for the predicate for a wiretap you need reasonable cause. You don't have to have the proof of the substantive crime, but at least a connection with the persons against whom you are trying to get the tap order.

There is another ground that I would like to inquire into and I think before I pass on this I will. It will take a few minutes for me to check it out, but is there anything else you want to tell me? Now, do you want to go into the constitutionality?

MR. BOUSE: No, I would like to linger on this a moment more, if your Honor please.

I don't see any good reason why the reliability of a victim should not—an alleged victim—don't forget, he is not bleeding all over the floor or anything—why the reliability [H 46] of an alleged victim should not be examined as closely as the reliability of an informer for this reason: There has been no substantiation outside of the alleged victim as to the alleged crimes perpetrated upon him. No corroboration that such crimes ever occurred. No more salient proof could be shown than the fact that two years later they have not been able to identify their assailants. So that raises a serious question as to whether these acts even in fact occurred which would throw us back to—

THE COURT: But you read that, you read that in there. There is some question about the assault upon Mrs. Holzman—

MR. BOUSE: I was getting to that point. That point is this: They doll up this transcript with Levy's sworn testimony who can't speak first hand about anything. The People whose testimony should have been sworn and heard by Judge Spitzer, Delores Billings, Mr. Holzman, Irving, those are the people who should have been giving sworn testimony, but they bring in Levy who can swear these—they said things to him and I'm not in any sense attacking Mr. Levy's credibility, but this is rank hearsay. There is no independent showing that a crime was committed, [H 47] no corroboration, no showing of reliability of the people involved as far as the truthfulness of what they told Levy is concerned.

THE COURT: Now, what else do you want to tell me? We have gone over that. What else do you want to tell me about the constitutionality? You said you wanted to mention something on the record and I will let you do that, if you want to.

MR. BOUSE: Constitutionality?

THE COURT: I just agree with Judge Fuld and Judge Desmond.

MR. BOUSE: I agree with Judge—

THE COURT: Wiretaps per se shouldn't be allowed in because it is violative of the Fourth—

MR. BOUSE: The Fourth and Fifth Amendment. I don't think there is any question on the constitutional ground that that would keep them, make them inadmissible in all Courts in the Country, not that they are.

THE COURT: There was a very recent case, the United States Supreme Court Case where certiorari was denied so I see no indication that the decision is not the law.

MR. BOUSE: No, but I think if your Honor looks at this tap, not the substance of it, of course, but the time [H 48] at which it was perpetrated as far as the defendant Kaiser was concerned, who was not named on the order, was not the subject of an investigation where there has been no testimony—

THE COURT: That may be true, but under the indictment, you read the indictment and you see that it is a question of aiding and abetting and a question of being involved in a conspiracy.

MR. BOUSE: No question about it and if the tap revealed his being involved in the conspiracy, and if the tap gave evidence of that crime that he was involved in, there would be no question that this would not be a good argument, but the tap doesn't reveal that.

THE COURT: How do you know? I haven't even heard the tap, have you?

MR. BOUSE: I have heard one of them and I only know—

THE COURT: I don't know how you heard them, I haven't even heard the tap myself.

MR. BOUSE: Mr. Doolittle played one for me.

THE COURT: I see.

MR. BOUSE: But from the prosecution I can only glean that this is not a tap in furtherance of a conspiracy, but an alleged admission of one and of course that is [H 49] subject to interpretation too, but without getting into the substance of the tap, we have an ex post facto type of tap waged against a defendant who was not a party to the order in the first place.

THE COURT: Well, I don't think that means anything, Mr. Bouse.

MR. BOUSE: Well, how then, if you want to apply the test of sufficiency, sufficiency of the papers and the testimony and if you want to apply that test, that there is reasonable grounds to believe he was committing a crime—

THE COURT: Are you saying this legally? Assume arguendo that there is no question about reasonable cause for wiretap of a particular phone and you say that assume that a telephone call comes in on that tapped wire and a person who is making the telephone call is right in the midst of a conspiracy and the mere fact that the wiretap or the predicate for the reasonable cause for the wiretap did not mention this person that therefore the wiretap is not any good?

MR. BOUSE: Not exactly. You are close to it. I am saying this:—

THE COURT: I am close to it? I don't know how [H 50] close I can get.

MR. BOUSE: I am saying this: If you want to adopt the McCall ruling as far as sufficiency is concerned where you have to show evidence or some reasonable ground that a crime is being committed and evidence of it can be obtained from a wiretap and you name the people involved, as to a third party, not named, that isn't sufficient.

THE COURT: No, the McCall didn't say what you just said.

MR. BOUSE: Well, that is what I got.

THE COURT: Well now, what you said before, the McCall case said that there has to be some factual statement of the affiant's experience with the informer's reliability and some factual showing of what the informer revealed are basic requirements and they cited in that case the Marshall Case, and there are other similar decisions that the informer's information was tested by independent observations.

Now, that's all part of the McCall Case and that is what it says. It never says that you have to prove the elements of the crime or anything of that nature.

MR. BOUSE: No, I didn't say that. I said if you [H 51] want mentally—I said if you want to obtain a wiretap order as to a third party, not named in it, it becomes a fishing expedition and therefore not under surveillance, not under investigation and there is no crime or suspicion of crime and as to a third party it is insufficient and an order which doesn't name the third party in the first place—

THE COURT: You see, that is where the original affidavit of Mr. Levy, not the supplemental inquiry by the Judge, you see if you read that it has some merit because Mr. Levy's affidavit says that he particularly involved, actively engaged in the investigation of the attempted extortion and conspiracy to commit the crime of extortion and the conspiracy to commit a crime which your petitioner has good and sufficient reason is being committed in

Nassau County and he mentions Salvatore Granello and Dino Conte.

MR. BOUSE: That is a printed form. They are always actively engaged.

THE COURT: What I am saying to answer your question that there was no investigation, obviously there was and that the supplemental, of course, inquiry of the Judge, Judge Spitzer, has always to be read in connection [H 52] with Mr. Levy's affidavit.

I am going to adjourn for a few minutes. I want to check one aspect of the law and I will give you a decision.

* * * *

[H 53] THE COURT: All right, People rest. How about the defendant?

MR. DOOLITTLE: Yes, your Honor.

MR. BOUSE: Defendant rests.

THE COURT: All right, as to your question, just so the record reflects it, there was some argument here about the question of jurisdiction of the County Judge to issue the wiretap.

Let the record reflect that there is no question that we have jurisdiction.

[H 54] Now, I have gone over these exhibits again, Exhibit 1A and 2A and I have reread the McCall decision. I find that there was reasonable grounds for the granting of the wiretap orders as to both of these, 212—LW 4-2523 and also for the telephone numbers 212 CA 6-8509 and 212 CA 6-8854.

You have an exception.

MR. BOUSE: Yes, if your Honor please.

THE COURT: All right, gentlemen, I think now if you get the jury down we can start to pick the jury.

MR. BOUSE: May we have, if your Honor please, a separate ruling as to not only reasonable grounds for the issuance of the order, but you also find that they are admissible against the defendant, Thomas R. Kaiser?

THE COURT: Oh yes, the reasonable ground and also I find—no, I haven't ruled whether they are admissible against him yet, because no foundation has been laid for the wiretap. I am not going to rule on that yet.

MR. BOUSE: No, just to the issuance.

THE COURT: Just to the—
MR. BOUSE: Not to the foundation.
THE COURT: You mean the wiretap proper?
MR. BOUSE: Yes.
[H 55] THE COURT: All I am ruling on is that there existed reasonable cause fo rthe issuance of a wiretap order.
MR. BOUSE: Well, that in effect rules on the admissibility in this trial wherein Kaiser is the only defendant so that your Honor is doing—
THE COURT: I am saying that ultimately they could be admissible providing all the other factors involved in the introduction of the wiretap are properly met.
MR. BOUSE: All right. May the record respectfully—
THE COURT: I am sure you don't want to press me on that, do you?
MR. BOUSE: No, I just want to get an exception to the entire ruling.
THE COURT: Oh, you have it, you have it.

* * * *

[82] AFTERNOON SESSION

(Roll call of jurors; all present.)

* * * *

(Mr. Doolittle opened to the jury on behalf of the People as follows:)

MR. DOOLITTLE: May it please the Court, Mr. Bouse, Mr. Foreman, Mrs. Roberts, gentlemen of the jury, Mr. Alternate Jurors, both of you:

At the outset of every criminal trial, the law imposes a duty on the district attorney to make an opening address and I am sure the Court will admonish you and I will draw to your attention the fact that what I say is not evidence.

The purpose of the opening is similar to opening the covers of a book and seeing the table of contents so that you have some idea of what is to follow and so that you will have some idea as far as a blueprint is concerned

as to what salient points to look for in the presentation of evidence.

Now, again I say that what I say is not evidence, and [83] should Mr. Bouse make an opening address that is not evidence. I merely ask you to listen to the opening, listen to what I tell you the People intend to prove and hold me accountable.

Now, the case is before you, Mrs. Roberts and gentlemen, by reason of the fact that the grand jury of this particular county, Nassau County, has returned an indictment charging this defendant, Thomas R. Kaiser, together with other named defendants, with six specific crimes. I have mentioned the word "blueprint" to you. In effect, this indictment is the blueprint, and the People must establish each and every element contained in this particular blueprint to your satisfaction beyond a reasonable doubt before you may find the defendant guilty.

Now, I am going to read the indictment to you so that you fully understand what the indictment is. You have all agreed that you understand the fact that the only person whom you are to try here is this particular defendant, Thomas R. Kaiser. You have all assured me, of course, that you will listen to all the evidence as it af- [84] fects all of the defendants in determining whether or not this defendant, Thomas R. Kaiser, has committed the particular charges with which he is being charged.

* * * *

[95] Now, Mrs. Roberts and gentlemen, this is the indictment. These are the things that the People have to prove. In substance, one count of conspiracy, to commit these various acts, one count of coercion, two counts of assault in the second degree, one count of attempted extortion and one count of burglary in the second degree.

The reading of this indictment and anything I say at this point is not evidence. This may not be considered by you except as I say a guide as to what this is all about.

I say to you at the outset that the People will prove this, and I draw your attention to this fact, and this is [96] something I want you to look out for during this case, that this case is the case of the People against Thomas R. Kaiser.

I say to you that the People will prove the guilt of Thomas R. Kaiser, beyond any reasonable doubt, that Thomas R. Kaiser together with Granello or Sally Burns and his friend Dino Conte, together with certain unknown persons entered into an agreement, an illegal conspiracy to extort $25,000 and a percentage of the business of Irving Holzman.

We will prove to you that Irving Holzman was a man who had substantial holdings in the juke box business, that in fact he had an extremely lucrative business, and we will prove to you that these defendants, realizing the lucrative business that Irving Holzman had, entered into this agreement wherein by threatening his wife and being part and parcel of a conspiracy and an act wherein the sum of $25,000 was attempted to be extorted from Holzman together with a percentage of his business, we will prove to you that they conducted certain acts, overt acts in furtherance of this conspiracy; that Holzman would [97] not cooperate; that he was not willing to go along with it, and that ultimately because of Holzman's reluctance to just automatically give $25,000 and 25 percent of his business to this conspiracy that when Holzman was away from his home three unknown assailants, the Roes and the Does—or was it four? A group of unknown assailants as part of this conspiracy entered into the home of Irving Holzman and pistol-whipped his wife, broke open the front door.

We will prove to you that this act was adopted by the conspirators and was, in fact, part of the conspiracy; that in fact this breaking in of the home was not really for the purpose of assaulting Mrs. Holzman but it was to assault Mr. Irving Holzman because he, in fact, would not go along with this attempted extortion.

We will prove to you that thereafter Holzman contacted the police and that from that point on the police and the district attorney's office investigated this case, and we will produce for you testimony of an electronic nature, monitored telephone calls, wiretap conversations between various conspirators and the victim, Irving Holz- [98] man, and between various conspirators, more particularly in this case between Conte and this defendant

Thomas R. Kaiser. And we will prove to you not just alone through the testimony of the witness Irving Holzman, not alone just through the testimony of Ruth Holzman, his wife, not just alone through the testimony of Ronald Billing and Delores Billing, his son-in-law and daughter, not just alone through the testimony of detectives, but through independant, dis-interested wiretaps and wiretapped recordings of the actual voices of these defendants. You jurors will actually be present at the time when the extortion and the conspiracy is being fulfilled. You will be present when this defendant, Thomas Kaiser, on a taped conversation—

MR BOUSE: Objection.

THE COURT: Sustained.

MR. DOOLITTLE: You will hear, gentlemen, an admission on a telephone conversation—

MR BOUSE: Objection.

THE COURT: Sustained only as to form. If you just go into the phraseology that you will prove.

MR. DOOLITTLE: We will prove to you that during [99] the course of this conspiracy Mr. Holzman, similar to many victims of conspiracies, was not fuly aware of the existence and the names and identities of all the co-conspirators. We will prove this to you—

MR. BOUSE: Objection.

MR. DOOLITTLE: This is what we intend to prove, your Honor.

MR. BOUSE: Operation of the mind of the witness. He hasn't even been introduced.

THE COURT: I'll sustain that. Go ahead. Sustained.

MR. DOOLITTLE: Well, your Honor—

THE COURT: Sustained. No argument.

MR. DOOLITTLE: Wait, your Honor.

THE COURT: Just a minute.

MR. DOOLITTLE: May I approach the bench?

THE COURT: Did you hear me? No argument. Sustained. I don't want any argument, not one word. That goes for the whole trial. That goes for you, too, Mr. Bouse.

MR. BOUSE: Yes, sir.

[100] THE COURT: You make your objection on the record; nothing else. Not one word in the presence of this jury.

MR. DOOLITTLE: I didn't want to do it in the presence of the jury, your Honor.

THE COURT: Objection sustained. Go ahead.

MR. DOOLITTLE: We will introduce to you a telephone conversation between this defendant and Thomas Kaiser. You will hear this conversation. You will hear the defendant Kaiser himself stating—

MR. BOUSE: Objection.

MR. DOOLITTLE: —and talking—

MR. BOUSE: Objection.

THE COURT: No, I'll overrule that.

MR. BOUSE: He is talking about somebody—

THE COURT: He is not giving the substance.

MR. BOUSE: He is talking about something that may be admitted and he is giving the contents.

THE COURT: Objection overruled. There are no contents at this time. At this point it is overruled.

Go ahead. Don't divulge the conversation. Continue.

[101] MR. BOUSE: I respectfully except.

MR. DOOLITTLE: May we just approach the bench, your Honor, with the stenographer?

THE COURT: No.

MR. DOOLITTLE: In the absence of the jury?

THE COURT: Absolutely not. Go ahead. I will let you have an objection on the record. Go ahead. Continue. Continue.

MR. DOOLITTLE: Your Honor, I can't continue at this point.

THE COURT: Continue.

MR. DOOLITTLE: May I just approach the bench, your Honor, with Mr. Bouse?

THE COURT: Absolutely not. Continue.

For your guidance, Mr. Doolittle, I will allow you to say to the jury exactly what you intend to prove.

MR. DOOLITTLE: That is precisely what I am trying to do, your Honor.

THE COURT: Without giving the substance of any testimony.

MR. DOOLITTLE: We will prove to you, Mrs. Rob-
[102] erts and gentlemen, that this defendant, Thomas Kaiser, together with Conte, Granello and these unknown persons was part and parcel of a conspiracy to extort money and to do the acts contained in the first count.

We will prove to you not by what I say and not only by the testimony of one witness but by the independent wire recording, the tape recordings.

Now, gentlemen, the Court has said I must not specifically tell you what evidence I will put in. I will merely say that I will prove this to you and you hold me accountable for it.

THE COURT: Mr. Doolittle, not verbatim. I will allow you to prove what you intend to prove without quoting the verbatim subject of the testimony—and you know exactly what I am saying.

MR. DOOLITTLE: Judge, I am completely at a loss. That's why I want to approach the bench so we can discuss this, your Honor.

THE COURT: Go ahead. Continue.

MR. DOOLITTLE: I'll need a few minutes to put my thoughts together, your Honor, because I prepared an
[103] opening which I can't follow now.

THE COURT: All right. Go ahead.

MR. DOOLITTLE: We will prove to you, gentlemen, that this defendant, Thomas Kaiser, was not in fact one of the assailants per se of Mr. Holzman.

We will prove to you that he, together with Conte and Granello and the four unknown defendants, acted in concert together with these defendants and with Granello and Conte to the extent that these four unknown assailants entered into the house of Mr. Holzman and pistol whipped Mrs. Holzman looking for Mr. Holzman, as part of this conspiracy.

We will prove that to you not only by the testimony of witnesses but also by independent taped recordings of actual telephone conversations with one of the defendants and with all of the defendants.

We will prove to you that statements were made by this defendant, Thomas R. Kaiser, which you may consider

admissions as to the absolute part and parcel of his participation in this conspiracy.

And you will hear these, gentlemen and Mrs. Roberts.

We will prove to you that this defendant, Thomas Kai-
[104] ser, together with the other defendants Granello, Conte and the four unknown defendants, did in fact act together and in concert and in furtherance of the conspiracy to extort money and a portion of the business of Irving Holzman, and because Irving Holzman would not cooperate, although he did not personally make the telephone call to Sylvia Billing was part and parcel and did act in concert and acted together with the person who in fact did in furtherance of this conspiracy call Sylvia Billing and tell her if her father did not cooperate—Irving Holzman did not cooperate—"Her fucking pregnant belly would be kicked in;" and we will prove to you that this defendant is guilty of that.

And we will prove that to you not alone by the testimony of one witness but by all the proof and by the independent taped evidence that will be before you.

And we will prove to you that the crime of burglary was committed by these four defendants themselves, the ones who actually broke into the home, but in complicity with and acting in concert with Granello and Conte and
[105] in furtherance of this conspiracy to extort money and a percentage of the business of Irving Holzman. We will prove to you that this defendant was guilty of that beyond any reasonable doubt even though, in fact, he was not there. And we will prove that to you not alone by the testimony of Mrs. Holzman, not alone by the testimony of Irving Holzman but by other evidence, by testimony and evidence of actual conversations of the conspirators. And we will prove to you that there, in fact, was a conspiracy and that Thomas Kaiser was as much a part of this conspiracy as Dino Conte, as Salvatore Granello, as John Doe, Richard Roe, John Roe and Daniel Roe, and we will prove it, gentlemen, not by what I say and not alone by what Irving Holzman says but by evidence that irrevocably will prove that in fact he was an intricate part of this conspiracy and a conspirator in each and every one of these counts.

[106] Now, gentlemen and Mrs. Roberts, let me say this: that during this trial it may appear that other people other than Thomas Kaiser are on trial. Do not under any circumstances lose sight of the fact that Thomas Kaiser is on trial in this case and that he is the one that is being charged, and that's why I say the People are not counting on the testimony of one witness or two witnesses. We are counting on proof, objective proof of all these acts. I ask you merely to keep an open mind at the outset, and remember what I say is not evidence, what Mr. Bouse says is not evidence. Listen to this case with a completely open mind, and I say, make me responsible to prove to you what I am saying.

In the question of proof, I will say this to you: The proof will go on and show acts of Conte and Granello, and the proof may indicate that these acts go on. There will be more testimony about Granello and Conte than there will be about Kaiser. I said that to you initially. There will be more acts of Conte and Granello proven than there will be of Kaiser, and I will prove to you that Holzman was not even aware of Kaiser's implication and [107] that the first time he became aware of it was after the conspiracy.

MR. BOUSE: Objection.

MR. DOOLITTLE: We will prove this to you.

THE COURT: Overruled.

MR. BOUSE: I respectfully except.

MR. DOOLITTLE: That after the conspiracy was completed, that after the conspiracy had ceased it was then as a result of a conversation that this defendant had with Conte that Holzman then became and law enforcement, and the District Attorney and the grand jury then became aware of his part in this conspiracy.

MR. BOUSE: Objection—

MR. DOOLITTLE: And we will prove to you—

MR. BOUSE: —as to who became aware of what.

THE COURT: No, overruled.

MR. BOUSE: I respectfully except.

THE COURT: That's what he's going to prove.

MR. DOOLITTLE: So listen very closely, gentlemen.

We will prove to you the conspiracy by the acts of this defendant, through the acts of Conte and Granello. We [108] will prove to you that this defendant in fact is equally guilty of this conspiracy with Granello and Conte by virtue of a conversation which we say to you, and we believe you will agree, is an absolute, complete admission of his part and parcel in this conspiracy.

I ask you now to listen with an open mind again and I plead with you, do not be led down the primrose path to the extent that you get caught on some collateral issue to the extent that you lose sight of the fact that the issue here before you is, did in fact Thomas Kaiser commit these acts?

Mr. Foreman, Mrs. Roberts, gentlemen, gentlemen alternate jurors, I will have an opportunity at the end of the entire case when all the evidence is in to address you again, to give you the People's summation or the People's statement through me, as to what inferences naturally and logically flow from the evidence. I only ask you to listen now attentively, keep an open mind, form no judgments either by anything I say or anything that Mr. Bouse might say until all the testimony is in and until you get to the point where then you, and you alone, have to judge the guilt or innocence of only one person, this [109] defendant, Thomas Kaiser. Thank you very much for your attention.

MR. BOUSE: Your Honor, at this time the defendant has motions with respect to the opening of the District Attorney which—

THE COURT: Before you get to that, do you wish to open or do you not wish to open?

MR. BOUSE: I would like to make a motion at this time.

THE COURT: Premature. Do you wish to open or not wish to open?

MR. BOUSE: I wish to open but I wish to make the motions prior to the opening.

THE COURT: Denied.

MR. BOUSE: I respectfully except.

[Mr. Bouse opened to the jury on behalf of the defendant as follows:]

MR. BOUSE: May it please your Honor, Mr. Doolittle, Mr. Foreman, Mrs. Roberts: You have heard the remarks of Mr. Doolittle, what he intends to prove or what he thinks he is going to prove, and as he so rightly says, nothing he says is evidence, nothing I say is evi-
[110] dence, and in fact, you heard it before, nothing his Honor says is evidence, only what you hear from the mouth or the mouths of the witnesses constitutes evidence, and of course whatever exhibits may be admitted into evidence.

There is no question that Mr. Doolittle knows less now about this case than you will at its conclusion. There is no question about that.

The defendant, Thomas Kaiser, is the only defendant on trial. You have heard that time and time again and you can see for yourself that he is, in fact, the only defendant on trial.

The evidence will show that he is a manager or was a manager of a children's amusement park.

The evidence will further show that he has become the sideline victim of a falling out of two operators. You may well call them two racketeers at the end of this trial. The principal parties in this trial are Messrs. Granello and Holzman. There is no question about that. Those are the two antagonists.

The evidence will show that Mr. Granello knew Mr. Holzman in 1958, met him in 1957. He along with Rocky Graziano formed a triumvirate at that time, in 1958. Thomas Kaiser was not known by any of them nor did
[111] he know them.

Now the evidence will further show that the defendant Thomas Kaiser knew Mr. Holzman for approximately one and a half years before the incidents, as outlined in the indictment, took place, one and a half years that he was a friend of Mr. Holzman; that he did certain duties for Mr. Holzman, among others, collection work on notes held by Mr. Holzman and that Mr. Holzman had promised to set him up in business. I am talking about the defendant, Thomas Kaiser. Consider that when you consider motive for what the defendant is charged with doing.

Now, the evidence will further show that the defendant didn't meet Sally Burns Granello until approximately one month before the incidents as described in this indictment. He was introduced by a boyhood friend named Dino Conte, Sally Burns Granello, this is one month before.

The evidence will further show, and you won't have to speculate on this, that Sally Burns Granello wanted to be Holzman's partner, he felt it was due him, he felt it was owed him.

The evidence will show that on numerous occasions [112] Granello claimed, and Holzman admitted, that Holzman owed his life to Granello because of certain testimony that Mr. Holzman gave in 1960, on a jukebox trial. There was no dispute about a debt owing.

The evidence will also show that Sally Burns Granello held four $25,000 notes of Mr. Holzman, $100,000 total, and now Mr. Granello wants to become a partner in Mr. Holzman's jukebox business.

The evidence will show that after being stalled off for a period of time, Mr. Holzman said, "Look, I'd like you in, Sally, but my partners don't." This is where we have the defendant coming in. Dino Conte, already a friend of Sally Burns Granello, the evidence will show he communicated with the defendant and said, "Look, you know Mr. Holzman, you know his partners, find out who his partners are so Granello can go directly to the partners and find out why he can't get in as a partner."

The defendant, Thomas R. Kaiser, helping his old friend, in a position to help, undertakes to get the information. These are the phone calls you are going to hear, if you her them. In the meantime there is a falling [113] out of thieves, Granello is tired of being stalled, Holzman is worried about the $100,000 in notes, Granello accuses Holzman of using them, accuses him of stealing an invention of his, pertaining to juke boxes.

The evidence will also show that at this particular time there is a $6,000,000 lawsuit by Granello against Holzman for the theft of this invention.

The evidence will show vague threats by Granello against Holzman. No question about that.

The evidence will also show that there were conversations between the defendant and Conte; that the situation was handled badly. Of course it was handled badly. The defendant, the evidence will show, was trying to gather information so there can be some kind of a business deal and on the other hand, Granello was going over on his own. The evidence will show that it culminated an outright dispute, fight, call it what you will, between Granello and Holzman.

The evidence will further show that Holzman went through the area, complaining of being victimized by [114] Granello, and that in the conversations between Conte and Kaiser, they jokingly referred to "Well, you can't have a deal here with this kind of action. We got to find another victim."

Listen to the conversations and listen to the tenure of the conversations and the attitude that accompanies them, and always look for motive. There is no question that Mr. Doolittle doesn't have to prove motive but you can consider the lack of it. Listen also to the testimony as you hear it—and it will be produced—of the personal relationship of the District Attorney of this county and Irving Holzman and the financial dealings between the Deputy Assistant District Attorney of this county and Irving Holzman and the relationship between the firm of Cahn and Mackston, half of which is the District Attorney of this county, and Irving Holzman.

The evidence will show that the defendant didn't conspire to do anything; that there was no conspiracy involving him, if there was any conspiracy at all; that he didn't threaten anyone or conspire to threaten anyone; that he was to receive no money or nothing, and people don't work that way these days; that he assaulted no [115] one, conspired to assault no one, and guide yourselves against being swept up in the emotion that can accompany bad language, undercurrents, atmosphere.

The burglary and the assault that Mr. Doolittle speaks of could well have happened. We don't know. If we were conspirators, would we know?

MR. DOOLITTLE: Objection.

THE COURT: Sustained.

MR. DOOLITTLE: That's summation.

THE COURT: No summation. Come on, Mr. Bouse. Continue on properly.

MR. BOUSE: Keep your mind open, Mrs. Roberts and gentlemen. You are not going to hear—if you hear anything about the defendant in the beginning you are not going to hear anything good. Please don't close your mind to the rest of the testimony. Certainly, don't close your mind to cross-examination after you hear the direct examination of any particular witness. In other words, keep your eye on the ball and see where it lands, see who it points at, see what it says, watch out for the traps, the atmosphere, the undercurrents, the emotions.

The testimony will show, when we are through, that [116] the District Attorney's Office of this county was used by a single citizen of this county to rid himself of a $100,000 debt. That's what the testimony will show when we are through.

Now, you are going to hear Mr. Holzman. The testimony will show that he was a felon, perjurer, an adulterer, committed frauds against the United States Government, procured abortions, and the testimony will further show that Thomas R. Kaiser never got a parking ticket. This is the criminal that is being tried on the word of Irving Holzman. This is the man you are trying.

Now, at the end, Mrs. Roberts, and gentlemen, I don't think there will be any question that you will have much more than a reasonable doubt. You will be convinced of this defendant's innocence beyond any doubt. And, perhaps, during this trial and during the deliberations you will probably wonder as to how your tax dollars are being spent.

Thank you very much.

* * * *

[130] MR. DOOLITTLE: Your Honor, before I proceed with any witnesses, I'd like to have certain exhibits marked for identification.

THE COURT: Yes, do that.

* * * *

[131] MR. DOOLITTLE: I would like to have reel described as 1290-a, reel 1, approximate footage 179 feet to approximately 202 feet marked People's 1 for Identification.

(Reel referred to received and marked People's Exhibit 1 for Identification.)

MR. DOOLITTLE: I would like to have reel described as 989-c, reel 1, approximate footage 67 feet to approximately 186 feet marked People's Exhibit 2 for Identification.

(Reel referred to marked People's Exhibit 2 for Identification.)

MR. DOOLITTLE: I would like to have reel described as 1290-a reel 3, approximate footage is 322 feet to approximately 364 feet, and approximately 364 feet to approximately 424 feet marked People's Exhibit 3 for [132] Identification.

(Reel referred to marked People's Exhibit 3 for Identification.)

MR. DOOLITTLE: Might I correct, your Honor, the description of feet. Actually that is meter reading. When I say "feet," I mean meter reading. It really isn't feet, I don't think.

THE COURT: All right.

MR. DOOLITTLE: May the offer be amended to the extent of feet I meant meter readings?

THE COURT: Yes.

MR. DOOLITTLE: I would like to have tape reel described as 1290-a, reel 6, meter reading approximately 467 to 500 marked People's Exhibit 4 for Identification.

(Reel referred to marked People's Exhibit 4 for Identification.)

MR. DOOLITTLE: I would like to have tape reel described as 9897-c, reel 2, meter reading approximately 4 to approximately meter reading 67 marked People's Exhibit 5 for Identification.

THE COURT: Was that 9897-c?

MR. DOOLITTLE: 9897-c, reel 2, meter reading ap-
[133] proximately 4 to approximately meter reading 67, be that feet or whatever it is, that's what it reads on the meter, marked People's Exhibit 5 for Identification.

(Reel referred to marked People's Exhibit 5 for Identification.)

MR. DOOLITTLE: I would like to have tape reel described as 1290-a, reel 7, specifically meter readings approximately 62 to approximately 84 and meter readings approximately 270 to meter readings approximately 342 marked People's Exhibit 6 for Identification.

(Reel referred to marked People's Exhibit 6 for Identification.)

MR. DOOLITTLE: I would like to have tape recording described as 583 10th Avenue, New York City, Holzman and Sally Burns bug, Holzman's office, the entire tape —no, I'm sorry, meter reading approximately 40 to meter reading approximately 429 marked People's Exhibit 7 for Identification.

(Reel referred to marked People's Exhibit 7 for Identification.)

[134] MR. DOOLITTLE: I would like to have reel described as 1290-a, reel 8,—if I may show this to Mr. Bouse—1290-a, reel 8, approximately meter reading 14 to approximately 48—wait a minute—yes, it is, approximately meter reading 14 to approximately 48 marked People's Exhibit 8 for Identification.

(Reel referred to marked People's Exhibit 8 for Identification.)

MR. DOOLITTLE: I ask that tape reel described as RCA-5, reel 1, meter readings approximately 137 to meter reading 306 and meter reading 408 to approximately 818 marked People's Exhibit 9 for Identification.

(Reel referred to marked People's Exhibit 9 for Identification.)

MR. DOOLITTLE: I would like to have tape reel described as BCO 4b, reel 07—reel 7—reel 07, meter reading approximately 202 to approximately meter reading 223 marked People's Exhibit 10 for Identification.

(Reel referred to marked People's Exhibit 10 for Identification.)

[135] MR. DOOLITTLE: At this time, your Honor, I offer into evidence or I ask the Court to take judicial notice—I withdraw that.

I will ask the Court to take judicial notice and apprise this jury of the fact that a court order dated July 1, 1964, was executed and signed by Judge Harold Spitzer, County Judge of the County of Nassau, permitting the interception of all telephone communications at No. 212-LW-4-2523, the telephone of the Headline Bar at 255 West 43rd Street, New York County, New York; that said order was signed and to be effective as of July 1, 1964, and was to be effective and in force up to or until August 29, 1964. Rather than offer it in evidence, your Honor, I ask the Court to take judicial notice and so advise this jury that telephone interceptions of that particular number of the Headline Bar were in fact legal telephone interceptions pursuant to a court order.

MR. BOUSE: Your Honor, the defendant has no objection except that the record should note that at the date has been changed in ink from June 30, 1964, to July 1, [136] 1964.

THE COURT: All right, with that exception. All right.

MR. DOOLITTLE: And will the Court so apprise this jury that all such telephone interceptions during that period were valid and legal pursuant to this court order.

THE COURT: The only problem with that is that—

MR. DOOLITTLE: Subject to the—

THE COURT: I won't even say subject to connection. All I will tell the jury at this time is—let me see it. (Handed to Court)

First of all, all I will say is that at this time that an order dated July 1, 1964, was signed by a former Judge

of Nassau County, one Harold Spitzer, in relation to authorization to tap a telephone instrument bearing No. 212-LW-4-2523, which is located at 255 West 43rd Street, New York. That's all I will tell the jury.

Now, that must be marked anyway. I want it marked anyway. Mark it.

MR. DOOLITTLE: I will mark it People's Exhibit 11 [137] for Identification.

(Order referred to marked People's Exhibit 11 for Identification.)

MR. DOOLITTLE: Your Honor, I am only having the order itself, not the accompanying papers, marked for identification.

THE COURT: That's all that has been offered is the order.

MR. DOOLITTLE: Right.

I ask the Court to take judicial notice that a court order was signed on July 1, 1964, by Harold M. Spitzer, County Judge of Nassau County, ordering and permitting the interception of all telephone communications on Nos. 212-CA-8509 and CA-6-8854, the telephone numbers of Patrissy's Restaurant, 98 Kenmare Street, New York County, New York, and that said order premitted the interception of all telephone conversations from the period of the date of the signing of the order on July 1, 1964, and that said order was effective and in force until the 29th day of August, 1964, making all interceptions and recordings of telephone communications from those numbers legal and valid pursuant to this order.

[138] THE COURT: All right, strike out "legal," and "valid," and all I will say is that—and I will say as I said before strike out the "legal" and "valid" part of it by counsel. But, I will tell you this: that there was permitted on July 1, 1964, by authorization of a former Judge of this court, Harold M. Spitzer, the authority to tap a telephone instrument which bore a telephone number 212-CA-6-8509 and telephone number CA-6-8854, that telephone instrument was located at 98 Kenmare Street, New York.

MR. BOUSE: Your Honor, the defendant—

THE COURT: Just a minute now. And that order was effective and was in force until the 29th day of August, 1964.

Now, what did you want to say?

MR. BOUSE: The defendant has no objection, your Honor, except as in the other order the record should show that the date was erased from June 20th and inserted was July 1, 1964.

THE COURT: Yes, it will so show.

All right, mark it. That will be People's No. 12 for Identification.

[139] MR. DOOLITTLE: That would be the order, only the order itself; right?

THE COUR8: Right.

(Order referred to marked People's Exhibit 12 for Identification.)

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MR. DOOLITTLE: The People call Mr. John Donovan.

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JOHN DONOVAN, 881 East 39th Street, Brooklyn, New York, called as a witness in behalf of the People, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Mr. Donovan, we have a lot of competition with the fans going so if you will talk right into that microphone everybody will be able to hear you.

By whom are you employed, Mr. Donovan?

A I am employed by the New York Telephone Company.

Q For how long have you been employed by the New York Telephone Company?

A I have been with them for about 21 years.

[140] Q Can you tell me the various positions you have filled for the New York Telephone Company? What position do you hold now?

A At the present time I am the internal auditor for them. Prior to that I worked for the special agent as an investigator. I was installation repair foreman and installer and repair man.

Q Now, pursuant to a request of the district attorney's office—I will withdraw that.

Are you familiar with the records kept in the regular course of business by the telephone company?

A I am.

Q And are you familiar with the records kept in regard to subscribers, subscribers' telephone numbers?

A I am.

Q Are you famiilar with the pairs and cables and binding posts, as to the procedure in that respect as to telephone numbers?

A I am.

Q Now, pursuant to the request of the district attorney's office did you bring with you the records of the telephone company as to the subscriber's name and all records [141] concerning the subscriber's name and location and type of service for code 212 LW-4-2453?

MR. BOUSE: If your Honor please, I object to this testimony at this particular time as being incompetent, irrelevant and immaterial; no foundation having been laid to show where we are going at this particular stage with regard to this particular testimony.

THE COURT: Overruled.

MR. BOUSE: I respectfully except.

Q Did you get my question, Mr. Donovan?

A I do have the records for LW-4-2523.

Q And what do the records of the telephone company indicate in respect to what type of telephone that is and where that telephone is located and in whose name that is subscribed to?

A The subscriber's name is the Headline Bar, the address is 255 West 43rd Street. It is a restaurant. They have message rate service. They have one extension and two portable phones and two jacks.

Q Now let me ask you this, sir: You have been with [142] the telephone company for 20 years and you have been in various positions that you have worked in.

Assume, sir, with your experience and your knowledge of the telephone company, that a wiretap was to be placed on that particular number. Would you tell us where that wiretap would be placed and how, in what manner it would be placed and what procedure as to how someone would ascertain the manner in which to put a wiretap—

MR. BOUSE: I object to that. It would be preferable to say where it was placed.

THE COURT: Just a minute. I will entertain your objection at this time to hear what you have to say but I am not going to let you say it in the presence of this jury. But, I will give you this one opportunity because obviously I want to hear what you have to say which relates to all of this.

MR. DOOLITTLE: I will withdraw the question.

THE COURT: I beg your pardon?

MR. DOOLITTLE: I will withdraw that question and ask another question.

THE COURT: All right.

Q Can you tell me, sir, do your records indicate what [143] pair and cable number apply to that particular number?

A Yes, sir, they do.

Q Will you tell me, sir, what is a pair and what is a cable?

A A pair are the two wires that conduct the conversations or permit the telephone number to be extended from the central office to the address of the subscriber. There are two wires that go from the position of the telephone into our central office.

The cable is a lead sheath group of wires that are made up of these pairs that carry many telephones from the vicinity or general location into the telephone central office.

Q In other words, the pairs ultimately leave the cable, is that correct, sir?

A Yes, sir, they do.

Q Do your records indicate at what place the pair leaves the cable?

A Yes, sir, it does.

Q Will you tell us where the pair leaves the cable if your records so indicate, sir.

[144] A In the case of LW-4-2523, the terminal address for the cable is 680 to 686 8th Avenue, in the basement of that building.

Q I see. Now, to intercept a telephone conversation on No. LW-4-2523, how would you do it from that location?

A If you went to that location and were able to identify the pair that line number was working on and attached a recorder or any listening device to that pair, you could hear the conversation.

THE COURT: How would you do that?

MR. DOOLITTLE: I am going to ask that.

Q How would you identify the particular pair and the particular cable. sir?

A By counting. You either would have to know the cable count in that terminal or you would have to know the binding post that that telephone number terminated at. They are both the same thing.

Q When you talk about binding post, specifically what do you mean by binding post?

A There are various sizes of terminal boxes—eleven pair, sixteen pair, twenty-six pair, and when I speak of [145] binding post I am talking of a sequential count starting at 1, 2 or whatever the number of terminals there are in that box.

When I speak or a telephone man speaks of a cable pair he speaks of the identity of that individual pair both in the central office and at that terminal, and the cable count is identified also for the box. Pairs 16 to 36 may terminate in one box. If you are counting cable pairs, you count 16 to 36.

Q Now, in this particular location to get to cable 517 pair 331, would there be any indication on the box showing where that particular pair and particular cable would be?

A Yes. Generally, it is stenciled on the cable box itself, the count.

Q I see. And should you intercept, should you tap onto those wires at that point in that basement, you would intercept telephone conversations going to the number LW-4-2453?

A 2523.

Q 2523, I'm sorry. Now, do your records indicate, sir, whether or not in fact a court order was presented [146] to the telephone company to permit the interception of telephone calls at that number LW-4-2523?

A No, sir, I do not have any record of that.

Q All right. Now let me ask you this, sir: Do you have with you the telephone company records with respect to CA-6-8854, that would be code 212, New York City.

A I do.

Q And do those records indicate a subscriber's name, address and type of service?

A It does.

Q Will you tell us what that is, sir.

A Patrissy's Restaurant at 98 Kenmare Street. It is a coin machine.

Q And do your records reflect a pair cable number and where these pair cables terminate?

A It does.

Q Will you tell us what your records indicate with regard to this.

A Pair 120, cable 3719, binding post 20, in the basement of 185 Mulberry Street.

Q And to intercept telephone conversations on that [147] particular telephone, if you tapped in wires at that location at 185 Mulberry Street on pair 120, cable 3719, you would be able to hear the conversation?

A You would hear the conversation associated with the telephone number.

Q If you attached a recording device to that and it was operating, you would record?

A Yes.

Q And, of course,—the same would be true, of course, of the previous number with regard to an attachment of a recording device if it is operating?

A Correct.

Q Will you tell me, sir, what the records of the telephone company reflect with respect to the subscriber's name and address and cable number and where they make their appearance of CA-6-8509, sir.

A CA-6-8509 is also Patrissy's Restaurant at 98 Kenmare and it is a coin machine. It is pair 167, cable 3719, binding post 43, and located at 187 to 189 Mulberry.

Q I see. Now, should you tap onto pair 167, cable 3719 at that location, 187-189 Mulberry Street, would you be able to intercept and overhear a conversation com-
[148] ing into that telephone number CA-6-8509?

A You would.

Q And should you put an operating recording device on that, would you be able to record the telephone conversations?

A You would.

THE COURT: Would you hear voices going out besides coming in?

THE WITNESS: In and out, sir.

Q You would record all telephone conversations, incoming and outgoing; is that correct, sir?

A That's correct.

Q Would you also be able to hear the dial tone?

A You would if you were listening with a listening device.

Q And if you were recording, you would be able to record the dial tone?

A Yes.

Q Incoming calls—would you hear the ring ring before the people answered the phone?

A You would.

Q Fine. If you were listening and recording with an
[149] operating recording machine you would record that; right, sir?

A You would.

Q Incidentally, would you tell us, please, what they mean by a drop line.

A By a drop line it is the connection that the telephone installer makes between the cable pair at the ter-

mination of the cable and the instrument itself or where it enters the house.

Q And is a drop line also a name for the line that you might use to tap into a phone to intercept a telephone call?

A Yes.

Q Mr. Donovan, I am not sure, but did you give me the pair and cable number and binding post of the Headline Bar? I think you did. Do you have it?

THE COURT: I have it, but let him repeat it so there will be no question.

A The pair and cable and binding post for the Headline Bar LW-4-2523 is pair 331, cable 8517, binding post 31, located at 680 to 686 Eighth Avenue, in the basement.

MR. DOOLITTLE: I have no further questions, your [150] Honor. But, pursuant to the rule of People against Rosario, I will present to Mr. Bouse the grand jury testimony of Mr. John Donovan, sworn to before the grand jury of the County of Nassau on July 16, 1964, pages 73 to 78, and page 81.

MR. BOUSE: May I have an opportunity, your Honor, to peruse the minutes?

THE COURT: Yes. Let the record indicate that the district attorney has turned over to defense counsel the grand jury testimony of this witness.

BY MR. DOOLITTLE:

Q Let me ask you one further question, sir: You say the terminal point in the Headline Bar is at 185 Mulberry Street. Is that correct?

A The terminal point for the Headline Bar is at 680 to 686 8th Avenue, in the basement.

Q And the one for Patrissy's Restaurant is at 185 Mulberry Street?

A That is correct—in the case of CA-6-8854. In the case of CA-6-8509, the address is 187 to 189 Mulberry.

Q Now, I think you have told us that to intercept or record telephone conversations in any one of those numbers if you hit the right pair and cable and attach two [151] wires to it or a drop line, you would be able to intercept conversations. Is that correct?

A That's correct.

Q That, of course, does not mean you have to stay in the particular location of the terminal to record or to intercept. Am I correct?

A No, sir.

Q You could bring long wires and go a couple of blocks away and intercept. Is that correct?

A That is correct.

MR. DOOLITTLE: All right, that's all.

## CROSS EXAMINATION

BY MR. BOUSE:

Q Mr. Donovan, this was about two years ago that you were called upon to perform this function on behalf of the Nassau County district attorney's office?

A No, sir, I was not called upon to do it.

Q Did you have any contact with the Nassau County district attorney's office during the period July or June, 1964?

A No, sir, I did not.

Q No direct contact. Would you say that within the [152] past few days is the first contact that you had with the Nassau County district attorney's office?

A Yes, sir, up until my contact with them for the grand jury testimony.

Q Yes. You testified before the grand jury?

A That is correct.

Q Would you say that was your first contact since July of 1964 with the district attorney's office?

A Yes, sir, within the last couple of days.

Q Do you know of your own knowledge who in your office might have had personal contact prior to your appearance before the grand jury?

A Yes, sir, I do.

Q And who would that be?

A It would have been the security director's office in Manhattan.

Q Do you know by name the person involved that would most probably be contacted?

A These generally come in the form of a subpoena asking for information concerning these passing cables. There is no particular one that handles the contact.

Q Your records, for instance, wouldn't show how many taps per year were made by the Nassau County.
[153] district attorney's office, would they?

A No, sir.

Q And you wouldn't know of your own knowledge how many?

A No, sir, I would not.

Q Now, can you tell from the records you have before you, Mr. Donovan, how many numbers of reels were used in the particular investigation that Mr. Doolittle has been referring to in his questioning?

A No, sir, I do not.

Q Your records would not indicate that either?

A We have no contact. We don't do any of this work. We just surrender the information under the subpoena.

Q In other words, your function is merely to ascertain the lines involved, set up the tap?

A No, sir.

Q What is your function? You ascertain the lines involved?

A We tell them the pair and cable number and that is it.

Q In other words, your function is strictly informative?

[154] A I wouldn't say informative. We provide this information under a subpoena and under no other condition.

Q I mean it is informative. You don't do anything physically.

A No, sir.

Q Anything physically to assist in the investigation.

A No, sir, we do not.

Q Now, you have been some twenty years with the telephone company I understand, Mr. Donovan.

A That is correct.

Q And part of that time you were a special agent in investigation?

A I was.

Q So that you have done a lot of these taps yourself personally?

A No, sir, I have not.

Q Have you ever during the course of your duties with the New York Telephone Company been the recipient of intercepted conversations?

A In the course of my duties, yes, I have.

Q And as an expert as far as telephones are con-
[155] cerned and investigations are concerned, would you say that a percentage of the vocal quality is lost on an intercepted telephone conversation?

A Under some conditions, yes, and under some conditions, no.

Q Would you not say that in all conversations the vocal quality wouldn't be the same as a face-to-face confrontation or conversation?

A Yes. In any telephone conversation that is true.

Q Could you give us this: The average estimate of vocal quality that would be lost on an intercepted telephone conversation?

A No, sir, I could not.

Q Well, could you roughly estimate it to be fifty per cent of vocal quality lost?

A No, it would not be fifty per cent.

Q You would not say it was fifty per cent?

A No, sir.

Q Would you say it would be 30 per cent lost?

A I would say less than that.

Q Even 25 per cent loss?

[156] A Probably less than that.

Q Would you say this: that you would get an amount of a vocal quality loss so that you may not be able to determine mirth or chuckling on the part of one or both of the users of the telephone?

MR. DOOLITTLE: Objection. It is highly speculative.

THE COURT: Sustained.

Q In the course of your investigation—

THE COURT: Only as to form. Sustained as to form.

MR. BOUSE: Oh. I didn't hear that, sir.

Q Would you say this: that in your interception of a telephone conversation you would not get everything from the conversation that might have been intended by the two people speaking to each other?

MR. DOOLITTLE: Objection, your Honor.

How can he testify what people intend by a telephone conversation?

THE COURT: No. I will sustain it as to form.

Let me ask you a question, Mr. Donovan. Mr. Bouse posed a question to you and your answer—you started but I don't think you finished it—with respect to a loss [157] that you were referring to, on a transmitted conversation over these wires it would be the same whether it is a wiretap or ordinary telephone. Is that correct?

THE WITNESS: That is correct.

THE COURT: So it would be the same if I were in my home and picked it up and spoke to somebody else, the same loss would be there as you would have in the wiretap?

THE WITNESS: Right.

THE COURT: And that is what you wanted to say?

THE WITNESS: Right.

THE COURT: Did you get that, Mr. Bouse?

MR. BOUSE: I didn't hear it too well, your Honor.

THE COURT: You may inquire.

BY MR. BOUSE:

Q Let me put it this way, Mr. Donovan. Would you say that in the interception of a conversation with the loss that you referred to which might be about 25 per cent, you might not hear a snicker or some other vocal indication of mirth or amusement?

MR. DOOLITTLE: Objection.

THE COURT: Sustained as to form.

[158] Q Let me ask you, Mr. Donovan—

THE COURT: Sit down, Mr. Doolittle.

MR. DOOLITTLE: I am anticipating it is going to be the same question.

THE COURT: Relax.

Q In your investigation wouldn't you say that a reel or a conversation taken out of context might be as misleading as a word or sentence taken out of context ?

MR. DOOLITTLE: Objection, your Honor.

THE COURT: See if he can answer that question.

A Sure, because it is exactly the same. Anything that is taken out of context is different than the intent whether it is written, spoken or overheard.

THE COURT: He got his answer. Now strike it all out. Disregard it. Next question.

Q Would you say that a conversation, an entire conversation taken out of context could be as misleading as a sentence or a word taken out of context?

MR. DOOLITTLE: I object.

THE COURT: Sustained.

Q Well, if you take a particular reel or a conversation out of context, you could get the wrong meaning if you [159] didn't have all the preceding reels, wouldn't you?

MR. DOOLITTLE: I object.

THE COURT: Don't answer. Sustained.

Q Now will you tell us this, Mr. Donovan: When you were investigating for the New York Telephone Company can you give us the type of investigations they were?

A Any investigations were generally of revenue loss or equipment loss or subscriber complaints which were the type of investigations that the special agents office conducted.

Q In other words, your investigation work was strictly intramural, was within the company, for the company, wasn't connected with police work?

A That is correct.

Q Now, when you appeared before the grand jury, Mr. Donovan, did you testify to additional telephone taps that were made other than those asked you by Mr. Doolittle?

A Yes, sir.

Q Do you recall the ones that you testified to before the grand jury?

MR. DOOLITTLE: May I be heard, your Honor?

I am going to object. May we approach the bench? because this is argument of law which I think should [160] not be in the presence of the jury. I think the Court should be apprised of certain things.

* * * *

(A recess was thereupon taken and the following occurred in the absence of the jury:)

THE COURT: Now, Mr. Bouse, before I even hear Mr. Doolittle, the question that you propounded seemed to me on the surface not to have any materiality at all.

MR. BOUSE: Which question?

THE COURT: Because the only purpose this witness testified to was specifically the two pairs or the various pairs that go into the number 212 LW-4-2523 and 212 CA-6-8504 and CA-6-8854. I don't see any materiality to that question unless you tell me what the purpose of it is before I even hear from Mr. Doolittle.

[161] MR. BOUSE: Inasmuch as Mr. Doolittle qualified him as an expert I thought maybe I would get some free expert testimony.

THE COURT: I don't mind you doing that. I think you can inquire but what is the pertinency or materiality of inquiring as to other taps? I don't see any point.

MR. BOUSE: I am not sure I know what question you are referring to.

THE COURT: You asked him whether he made any other taps or testified to other numbers.

MR. BOUSE: Oh, yes.

TH ECOURT: What is the point of that?

MR. BOUSE: So that we will know all of the taps that were gone into, into the investigation.

THE COURT: The only purpose that you have the grand jury testimony is solely on the question of credibility and the purpose of your being given that testimony is to see whether there were any prior inconsistent statements embodied in his testimony before the grand jury, to allow you to test his credibility.

Now, if you are going into something on which he [162] didn't even testify to, I don't see how you can question his credibility. The objection is sustained.

Do you make an objection?

MR. DOOLITTLE: I made an objection.

THE COURT: Now what were you going to say?

MR. DOOLITTLE: I was going to say the only numbers we are concerned with are these numbers.

THE COURT: I don't care that you wanted to get expert advice.

MR. BOUSE: I wasn't going on that, then. May I say this: that if I am allowed to inquire into other taps made, credibility questions may arise.

THE COURT: In what way? I will listen to you.

MR. BOUSE: If he forgot a particular number that he had been questioned or queried about before the grand jury—in other words, one of the numbers—

THE COURT: Assume that what you say is correct, that he had fogotten about what he had testified as to others, that would not affect in any way his credibility as to what he testified to, unless on the theory that perhaps his memory is so impaired he might be confused.

MR. DOOLITTLE: May I make this statement—

[163] THE COURT: Let me hear what he has to say because I don't see the materiality of what he says.

MR. BOUSE: Here I think it becomes material. Mr. Doolittle has discussed in his voir dire and on his opening a witness, Rocky Graziano. I see in the grand jury minutes a particular line listed to Audrey Graziano, on Queens Boulevard, who was the subject of an inquiry before the grand jury, of this witness.

Now, I think inasmuch as the potential, as far as a witness is concerned, is manifest with the name and he has testified before the grand jury with regard to a tap on that number, I think I have a right to inquire further into how many other taps were made and how many people involved in the particular case.

THE COURT: No. I will tell you why on the record. I am not going to allow you to do that. First of all, it is discretionary with me, but I have an added duty and I am not going to permit to be embellished in this record on the question of credibility the interjection of possible taps on other people's phones because I have and you should have and I am sure you wouldn't do it intentionally, [164] but we have a duty to protect people and I am not going to question the credibility to allow into this evidence of possible taps on other phones which may raise an inference by some publication in the newspaper that there might have been some implication of a person who is absolutely innocent, has nothing to do with this case, and by inference or some note in some paper, and I am not going to do that.

I am telling you now, if that is the purpose of your interrogation, don't do it.

MR. BOUSE: No. If your Honor please, may I say this; that the purpose of interrogation is completely consistent with your Honor's feeling that many innocent people have their phones tapped on a fishing expedition type of situation and that a few fish get caught now and then. That is the point of bringing out these additional taps.

THE COURT: I am not going to let any names be interjected here. The sole purpose here is to question the credibility of this witness. I will let you inquire if you want to get some free expert testimony. I will even let you do that providing you phrase the questions properly. [165] I will let you do that, but I tell you now I will not allow you to do the other.

MR. BOUSE: I respectfully except.

* * * *

[166] MR. BOUSE: May the record show a continuing objection with respect to all this testimony, of no foundation being laid, that is, any testimony with regard to wiretapping.

THE COURT: Well, I don't know that I follow your thinking.

MR. BOUSE: There is no proof that a conspiracy has [167] been committed, no proof that the defendant has been involved with anything, and we have wiretaps. We don't know how many.

THE COURT: But there must come a point where you have to make inquiry and this is a point to make.

MR. BOUSE: It will be nice to put Mr. Holzman on the stand and have him testify to the fact that he got hurt, there was an assault, burglary, this and that, and put in the wiretaps, and not put the wiretaps in first.

THE COURT: In other words, you are objecting to the procedure?

MR. BOUSE: Yes.

MR. DOOLITTLE: I appreciate the instructions Mr. Bouse is giving me but I have formulated my own method of proving my case. This witness is not talking about wiretaps. He is talking about pairs and cables.

THE COURT: No, he hasn't said anything. But let me tell you this and I will tell you right now that I am familiar with the general rule and I am familiar with the exceptions and I intend to follow procedure, that I will not [168] allow declarations of co-conspirators which are in the furtherance of a conspiracy unless your presentation of proof is directed primarily to prove the conspiracy first. Now you can tell me and show me a lot of cases that say everything goes in the basket and at the end there is a question of fact that the jury will have to decide whether a conspiracy prima facie has in fact been allowed before the declaration of co-conspirators are admissible, but I want you to present your proof, all the specific acts, all the conversations, so that you can give me prima facie before we go into the declarations of the co-conspirators which are admissible against each other.

MR. DOOLITTLE: May I say that that is physically impossible unless I had three witnesses on the stand at once and all talking together.

THE COURT: Absolutely not.

I will advise you this, Mr. Doolittle, I don't think so. I am familiar with this theory very well but I say that I think that the order of proof for you as well as for the defendant is that you give me that testimony which will give those specific acts and declarations, which would give me prima facie proof of conspiracy. Now if you say it [169] is a physical impossibility, that is one thing.

MR. DOOLITTLE: May I say this: that there are certain bits of proof that I have to submit, subject to connection, and the Court will have to rely on my good faith as an officer of the Court, that in good faith I believe these can be connected.

You will notice that I haven't offered anything in evidence at this point. I cannot. I don't intend to until my foundation is properly laid and I can assure the Court that these tapes will be offered into evidence ultimately, through the witness who can identify the voices, after all the other procedures have been complied with.

THE COURT: After all the testimony from other witnesses.

MR. DOOLITTLE: Absolutely.

THE COURT: You see, because you can readily see for the People and for the defendant we cannot be naive, that after the spoken word has been said, and whether I use the most flowery expressions to wipe out what is indellibly imprinted in the minds of the jury as to whether [170) or not a declaration of the co-conspirator is binding on the co-conspirator because it is in furtherance of a conspiracy, but I will tell them that they cannot take it if the conspiracy hasn't been proved. But what I want you to do is to give me, if you will, in your presentation of proof those facts, those acts, those declarations which will give the Court prima facie conspiracy to help, so I will keep to a minimum the admonition that I have to give to the jury on the reception of declarations of co-conspirators which are in furtherance of the conspiracy before the conspiracy has been proven prima facie. I think I make myself clear, don't I?

MR. DOOLITTLE: I am a little bit lost, Judge.

THE COURT: Where are you lost?

MR. DOOLITTLE: I am lost because I am going to have to prove declaration, which undoubtedly, will be subject to connection.

THE COURT: You cannot do it all.

MR. DOLITTLE: Absolutely. Wherever it is humanly possible, Judge, I will do it.

THE COURT: All right. Now, Mr. Bouse—

MR. BOUSE: I just prefer it be perfectly legal, [171] whether it is humanly possible or not.

THE COURT: Let me tell you, Mr. Bouse, it will be legal.

MR. BOUSE: I am sure of that.

[A recess was thereupon taken.]

[The following occurred in the absence of the jury:]

THE COURT: On the record.

MR. BOUSE: Your Honor, I have a hypothetical question: Assuming that you'd set up a tap similar to the information that you are giving Mr. Doolittle; and assuming you had a listening device and a recorder, and assuming further a loss of vocal quality such as you have testified to, would it be possible that you would fail to hear expressions of mirth in the conversation? Just that.

THE COURT: I will let him answer that.

MR. DOLITTLE: Well, I'm going to object to it.

THE COURT: Well, he's interjecting a question of mirth. He is just asking him whether or not—frankly, you should ask him whether or not could you hear any expression of mirth over the telephone even with the loss [172] loss of vocal quality.

MR. BOUSE: Well, that's the negative. I want to ask him would it be possible—

THE COURT: All right, I will allow it. Come on. Bring in the jury. But I don't want you to go on any fishing expedition. That's the only purpose I'm allowing it.

MR. DOOLITTLE: You will permit me to make my objection for the record?

* * * *

JOHN DONOVAN resumed the stand and testified further as follows:

CROSS-EXAMINATION [continued]

BY MR. BOUSE:

[173] Q Assuming, Mr. Donovan, that the taps were set up in a given situation such as you have described for Mr. Doolittle, and assuming further that you had the assistance of a headset or hearing device, and assuming further that the conversation was being recorded, and assuming further that a 25 percent loss in vocal quality, as far as the conversations were concerned, such as you have testified to, would you say that it was possible not to hear certain expressions of mirth which might be lost in that 25 percent loss of vocal quality?

THE COURT: Objection sustained because you are assuming a set of facts that are not even in evidence.

What he wants to know, Mr. Donovan, assume for the sake of argument that you say there is a loss of vocal quality in some transmission, whether it be an ordinary phone or wiretap, supposing somebody laughs, would you hear it?

THE WITNESS: Yes, sir.

THE COURT: Is that what you want to know?

A Yes.

Q If somebody guffaws, would you hear that?

A Yes.

[174] Q So there is no loss of 25 percent? Is that your testimony?

A I didn't say there was 25 percent loss.

Q Well, there is a percentage loss; didn't you say that?

A Yes.

Q What percentage would you say was lost of the vocal quality? You know there is a loss.

A There is a slight loss, yes, sir.

BY THE COURT:

Q What do you mean by "lost," being technical?

A The quality of my voice as I speak to you now is the tonal quality, the overtones, the harmonics of my voice carefully, exactly reproduced through a telephone, the same as they are not through a radio, the frequency response of any electrical instrument is limited in fidelity by the equipment that the componnts are made of.

Q In other words, the spoken word is there but the up and down, the pitch and variance is not?

A Correct.

THE COURT: All right. O.K.?

MR. BOUSE: Well, just one more question.

BY MR. BOUSE:

[175] Q Is it your testimony, Mr. Donovan, that no expression of mirth would be lost?

A No, sir.

Q That is not your testimony?

A Would you repeat your question, please?

Q Is it your testimony that no expression of mirth would be lost?

MR. DOOLITTLE: I am going to object to that. I mean audible expression.

THE COURT: Well, no.

MR. DOOLITTLE: An expression of mirth might be a smile, your Honor.

THE COURT: Objection sustained.

No more comments. I don't want any more comments out of you the rest of the trial. He is an expert witness. Do you understand the question?

THE WITNESS: Yes, sir.

THE COURT: What is your answer?

THE WITNESS: My answer, that would be anything that is audible would be heard.

Q But in that percentage of loss, wouldn't something that would be audible between two people in a confronta-
[176] tion be liable to be lost on a telephone conversation?

MR. DOOLITTLE: Objection.

THE COURT: Objection overruled.

Can you answer it?

THE WITNESS: No, sir.

THE COURT: The answer is no.

Q So there is no vocal loss?

A There is a tonal quality of your voice.

MR. BOUSE: I have no further questions.

THE COURT: Do you have any other questions?

MR. DOOLITTLE: Yes, sir, I have a few, your Honor, just a few on redirect.

## REDIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Mr. Donovan, the pairing and cables that you told us about, the telephone—you are familiar with the policy of the telephone company in regard to those; am I correct?

A Yes, sir.

Q Do they ever release those pairs and cables to anybody other than an authorized law enforcement agency with a court order?

[177] MR. BOUSE: I will object to that as improper redirect. I didn't touch the cables.

THE COURT: Well, it is technically improper but I'll allow it. He has already testified to it.

What is your answer?

THE WITNESS: They give the pair cable to nobody, but only to the law enforcement agencies, only on a court order.

Q Now one further thing. You talked about the loss of tonal quality, and I just want to clarify this a little bit in my own mind. In effect, what you are saying is there is no such thing as perfect fidelity of voice or a transmission of a voice?

A That's correct.

Q I mean, can be draw the analogy like the old records they used to have record tracks but now they have fidelity; it isn't 100 percent pure fidelity?

A Yes.

Q Is that what you mean by tonal conversation?

A Yes.

Q It is not a volume loss?

A No, sir.

Q Fine. Thank you. Now, if you had 150 people tap-
[178] ping on any one wire, for example, on the LW number that you gave us, would that reduce the volume in any respect on any of those wiretaps or on the ultimate telephone conversation between two people?

A I couldn't say. I have never—I can't visualize 150 taps on a wire.

Q Well, let's take one tap or five or ten taps, even.

A It would be the same.

Q In other words, it would be no volume loss?

A No, sir.

MR. DOOLITTLE: Fine. Thank you very much.

## RECROSS-EXAMINATION

BY MR. BOUSE:

Q When you talk, Mr. Donovan, about a tonal loss such as you may have experienced during your investigation, could that lead also to a possible mistaken attitude of one of the speakers?

MR. DOOLITTLE: Objection, your Honor.

THE COURT: Objection sustained.

MR. BOUSE: I have no further questions.

I respectfully except to your ruling.

MR. DOOLITTLE: Than you, Mr. Donovan.

[179] [The witness was excused.]

MR. DOOLITTLE: Detective William Beach.

WILLIAM J. BEACH, Detective, Shield 4, Main Office Squad, Nassau County Police Department, Nassau County, New York, called as a witness on behalf of the People, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Detective Beach, you are a detective of the Detective Division of the Nassau County Police Department, is that correct?

A Yes, sir, I am.

Q Now, on July 3, 1964, were you attached to the District Attorney's Racket Squad, sir, Rackets Bureau?

A Yes, sir, I was.

Q For how long had you been attached to the District Attorney's Office prior to that time?

A Since 1958, sir.

Q Will you tell me what your duties were in the District Attorney's Rackets Bureau.

[180] My duties were primarily in the wire tapping field.

Q Tell us something of your experience and background in that, will you, please, Detective Beach.

A Well, I have testified before in the District and County Courts and the Grand Jury of Nassau County.

I have had training within the police department and I attended seminars and lectures in Manhattan College on this subject.

Q In regard to interception of telephone calls and wire taps, is that correct, sir?

A Yes, sir.

Q During that time, pursuant to court orders, have you tapped telephone wires?

A I have, sir. Yes, sir.

Q Now, did you have occasion on July 3, 1964 to install a recording device tapping the wires for the Headline Bar, located at 255 West 43rd Street, telephone number, 212-LW 4-2523?

A I did, sir, yes, sir.

Q Will you tell me, did you tap that wire, sir?

A Yes, sir, I did.

Q Did you attach a recording device on to that [181] wire?

A Yes, sir.

MR. BOUSE: If your Honor please, excuse me, may we have a continuing objection to this testimony as no proper foundation having been laid for it.

THE COURT: No, you have an objection.

Q I show you People's Exhibit 11 for Identification and I ask you, sir, whether or not you did it pursuant to that court order.

THE COURT: The answer is yes or no.

A Yes, I did.

Q All right, may I have that, please.

Now, mechanically, sir, will you tell me, Detective Beach, exactly what you did when you tapped a wire recording device or a tape recording device on to this number LW 4-2523 and who was with you?

A Pursuant to information that we had received from the New York Telephone Company, I attached a dropline to pair 331 in the basement of I believe it was 68 Eighth Avenue in New York, and that was in cable 8517, and I then hooked this dropline on to a recording device that I had brought with me, and this was done in the presence of Detective Skuzenski.

[182] Q Did you check to ascertain whether or not that recording device was in operating order?

A Yes, sir, I did.

Q Will you tell me what tests you conducted, sir?

A Well, it's a series, it's conducted with the telephone hand-set to ascertain that the machine starts and stops properly.

Q When you say it starts and stops properly, how exactly does a record machine work when you tap into a wire, will you tell me? Does it continue to run or does it run only when telephone calls are made? How does it work?

A Well, basically these recording devices that we have—

THE COURT: When you say "recording devices," what is it? Any name to it? Tell us what it is.

THE WITNESS: Well, it's basically an ordinary tape recording that anybody can buy in a store, and these are either altered by ourselves or some outside corporation alters them and installs an automatic starting device.

Now this starting device is incorporated into the [183] machine and it is put through on the motor side. In other words, the recording device is put into the 110 circuit, it's a series of relays that hold the 110 circuit from being completed. When the telephone is picked up the line voltage drops, the relay closes, it completes the 110 circuit and the automatic recorder starts and records the conversation coming over that given telephone.

Q. From the layman's standpoint, in other words when a telephone call is made or somebody answers a telephone or when a telephone rings or when there is dialing, that starts the tape revolving and recording, am I correct?

A The minute that the telephone is picked up from the cradle, the telephone receiver, the machine automatically starts and all during the time it will record every conversation, either incoming or outgoing, over that telephone, and when it's set down in the cradle the machine stops and it stays dormant until it's picked up.

Q Then it reactivates and records that?

A Yes.

Q Now, this particular device that you put on pair [184] 331, cable 8157, for the number LW 4-2523, was operating at the time you put it in, is that correct?

A Yes, it was.

Q Who was with you at the time, Detective Beach?

A Detective Skuzenski.

Q Did you see Detective Skuzenski do anything relative to placing any tapes on that machine?

A Detective Skuzenski put the tapes on.

Q Did you see whether or not he broke the seal, whether or not there was a new box or what?

A Yes, sir, it was a new box.

THE COURT: Who was the operator of the device?

THE WITNESS: Pardon me?

THE COURT: Who was the operator of the device or the machine? Who was the operator?

THE WITNESS: I did the installing.

Q Incidentally, Detective Beach, you have done this on many occasions, pursuant to a court order, am I correct, sir?

A Yes, sir, I have.

Q Now, in addition to this, have you also monitored telephone conversations, placed recording devices on a telephone with the consent of the person whose telephone con-
[185] versations you wished to record?

A Yes, sir, I have.

Q And is it the same type of recording machine that operates or records and moves only when the telephone is picked up?

A Yes, sir, it is.

Q So that that type of machine where the telephone conversation is being monitored would not just be constantly going around, am I correct?

A No, sir.

Q Only at such time as telephone calls are made?

A Yes, sir.

Q And when the phones cease to be in progress then the machine stops as I think you said, dormant, until it is used again, is that correct?

A Yes. It does have a manual control. You can run the tape recorder.

Q You can if you want to?

A Yes, sir.

Q You, incidentally, did not remove the tape that you saw Detective Skuzenski put on the recording machine that you tapped into, No. LW 4-2523, did you sir?

A No, sir, I had no further connection with this.

[186] Q This was the end of your function as a police officer in regard to that number?

A Yes, sir.

MR. DOOLITTLE: I have no further questions.

CROSS-EXAMINATION

BY MR. BOUSE:

Q Do you ever recall in your experience, Detective Beach, tapping without a court order?

MR. DOOLITTLE: I have no objection to that question.

A No, sir, never.

Q Never did that?

A No, sir.

MR. DOOLITTLE: For the record, your Honor, Detective Beach testified before the grand jury on July 16, 1964, pages 79 and 80, and accordingly as to the rule of People against Rosario, I will present this to Mr. Bouse, the grand jury testimony.

THE COURT: All right. The record will reveal that the grand jury testimony of this witness is turned over to defense counsel.

Q Now, as I understand it, Detective Beach, somehow or other you with Detective Skuzenski, you went to the [187] basement of this building wherein was the phone LW 4-2523?

A Yes, sir.

Q How did you get into the basement?

A Through one of the side entrances.

Q Did the owner of the building know you had come in or had you contacted him?

A We contacted somebody in the building, sir. I don't know whether he was the owner or what. I believe it was the man behind the desk.

Q Well, were you escorted in or did you just make your entrance?

A Well, we will go in and declare ourselves.

Q No, on this particular occasion.

A Yes, sir, I declared myself. I told him what we were there for.

Q Do you know who it was that you talked to?

A I wouldn't know his name, no, sir.

Q You didn't receive any written authority from him that you could enter the basement and proceed to do this tap?

A No, sir, it was verbal.

Q Now, on what date was this tap performed or this [188] function wherein you set up the recorder? I think you said you installed it and Detective Skuzenski made the tape on the recorder, what was the date?

A That was July 3, 1964, sir.

Q Now, you were aware at that time what investigation was being conducted, is that right?

A I had a vague idea, yes, sir.

Q Well, you knew the people that were being investigated at that time or—

A No, sir, I did not.

Q You didn't know the names of any of the people?

A No, sir.

Q Well, let me ask you this: Did you remain with the tapping device while it would be performing its function?

A I don't follow your question.

Q Well, would you just set up the recorder which is automatic, as you have indicated, and leave or would you remain with the recorder while it seemed to be in activity?

A No, I would set the machine up and then I would leave, sir. I would have no further contact with anybody.

[189] Q Well, then, with regard to this particular basement on July 3, 1964, what would you say was the total time you and Detective Skuzenski spent there with this equipment?

A I would say somewhere in the area of thirty to forty-five minutes.

Q And that time was utilized for the sole purpose of setting up the equipment?

A Yes, sir.

Q Not to listen to conversations?

A No, sir.

Q So that you yourself did not hear any conversation on July 3, 1964?

A No, sir, none whatsoever.

Q Did you perform a similar function on any other phone in connection with this investigation?

A I don't believe so, no, sir.

Q Detective Beach, did you have anything else to do in any way, shape or form with this investigation?

A I don't believe so. No.

Q So that would it be fair to say, from your testimony, that July 3 was the only day that you were concerned with this investigation and you spent something

[190] like forty-five minutes utilizing that time for the setting up of the equipment? That would be the sum total of all the contact you have had with this investigation? Would you say that?

A I believe so, yes.

MR. BOUSE: Thank you, Detective.

I have no further questions.

MR. DOOLITTLE: Just one or two further questions, something I neglected to bring out on direct.

## REDIRECT EXAMINATION

### BY MR. DOOLITTLE:

Q After you set up this machine and found that it was operating, did you secrete this machine in any way, sir?

A Yes, sir, I did.

Q Will you tell me, did you secure it?

A Yes, sir.

Q Will you tell us how you secreted it and how you secured it?

A It was—the machine was placed in a storeroom in the basement of the building, I believe the number was 680, and after securing and placing it in the storeroom [191] and the dropline was secured to it, the storeroom was locked, placed under lock and key.

Q Did you have a key, sir?

A Yes, sir, we did.

Q Did you ultimately give that key to Detective Skuzenski?

A Yes, sir, at that time Detective Skuzenski took it.

MR. DOOLITTLE: All right, fine. Thank you.

MR. BOUSE: Just one other question.

## RECROSS-EXAMINATION

### BY MR. BOUSE:

Q Do you know, Detective Beach, whether Detective Skuzenski continued on this particular investigation, the one that you spent forty-five minutes on?

MR. DOOLITTLE: Well, your Honor, I don't know how he would know. I am going to produce Detective Skuzenski.

THE COURT: Overruled.

Do you know?

THE WITNESS: I honestly don't know. I believe I did but I couldn't honestly say.

MR. BOUSE: Thank you, Detective.

[192] I have no further questions.

MR. DOOLITTLE: I have no further questions.

Thank you, Detective Beach.

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[209] CLIFFORD CRAWFORD, Shield 24, Main Office, Police Department, County of Nassau, called as a witness in behalf of the People, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Detective Crawford, you are now and you were in 1964 attached to the district attorney's rackets squad; is that correct, sir?

A I was and am.

Q What were your functions as a detective for the rackets squad, sir?

A Detective assigned to the district attorney's rackets [210] squad, investigative officer; and also have done wiretapping installations for the district attorney's office.

Q What has been your experience in wiretapping with the district attorney's office?

A I have been doing the wiretaps for the past five years for the Nassau County district attorney's office. I have gone to seminars. I have gone to Farmingdale Agricultural College to further in electronics.

Q And you have had much practical experience in the field, is that correct?

A I have.

Q Let me ask you this, sir: On July 3, 1964, did you have occasion to install a wiretap at 185 Mulberry Street on the telephones for Patrissy's Restaurant?

A I did.

MR. BOUSE: If your Honor please, may the defendant now have on the record a continuing objection to the order of proof upon which the porsecution is proceeding. There has been no foundation laid for this type of testimony at this particular time.

[211] THE COURT: Well, I would say this: It is not binding on this defendant at all at this time. If and when it is connected, that is a different thing. But, with that admonition, the objection is overruled.

MR. BOUSE: I respectfully except.

MR. DOOLITTLE: At this time, your Honor, before I proceed with Detective Crawford I would like to have People's Exhibits 11 and 12 for Identification marked in evidence.

THE COURT: Show them to Mr. Bouse. These are the court orders. Any objection?

MR. BOUSE: No.

THE COURT: Mark them.

MR. BOUSE: Do I understand that your Honor has taken judicial notice of them?

THE COURT: He has offered them. Do you have any objection?

MR. BOUSE: Oh, I didn't realize that. Of course. The objection would be same as the prior one: upon which the prosecution is proceeding.

THE COURT: Do you have any specific objection to the exhibits? I overruled the objection on the order of [212] proof.

MR. BOUSE: Only as to that those two are out of order; not as to the content or substance or validity but the order they are being put in evidence.

THE COURT: I will overrule that.

MR. BOUSE: I respectfully except.

(People's Exhibits 11 and 12 for Identification now received in evidence and marked People's Exhibits 11 and 12.)

Q Now, the wiretap that you installed at 185 Mulberry Street on July 3, 1965, was that pursuant to People's Exhibit 12 in evidence?

MR. BOUSE: I think that calls for a legal conclusion, your Honor.

MR. DOOLITTLE: It has to be pursuant to that.

THE COURT: Just a minute. Overruled. No colloquy. That's the end of that. Just make an objection. Don't answer him, Mr. Doolittle.

A Yes, this is the order.

Q Fine. Now will you tell me what you did on that [213] particular occasion as far as installing a machine and tapping the Canal 6-8854.

THE COURT: The objection to that question is sustained as to form. Tell us exactly what you did pursuant to that.

MR. DOOLITTLE: That was my next question.

THE COURT: Don't add anything else. Go ahead, tell us what you did.

THE WITNESS: I was armed with the court order with regard to putting a wiretap on the telephone of CA-6-8854.

I also had in my possession the appearances for this particular subscriber's phone which showed up in the rear of 185 Mulberry Street, Manhattan.

I then attached two conductor wires to the terminals with pair 121, cable 3719, binding post 20. I then stretched this wire to a location where I had an automatic tape recorder installed.

I then installed this wire onto that tape recorder. After hooking up to the tape recorder I put a tape on this tape recorder. It was a clean tape, sealed. I broke the seal [214] and placed it on his recorder.

I then checked the phone to see if the recorder was starting and stopping properly, and it was. I also checked that it was the correct party that we were armed with because I heard a conversation on the phone where someone called into the phone and said "Patrissy's Rest."

[215] Q Can you tell me which particular number of Patrissy's Restaurant you tapped into?

A CA 6-8854 was the telephone number.

Q Now, did you secure the machine, sir?

A Yes. I had the machines located in a room secured with a padlock, and I had the key for that room.

Q What if anything did you do with the key to that room?

A I brought it back to the office, in my possession.

Q Did you subsequently turn that key over to any person?

A I turned it over to my squad commander, Sergeant Tozzi.

Q Now, you never did take that reel off, is that correct?

A I don't believe I did. I would say no.

Q I show you People's Exhibit 10 for Identification and I ask you whether or not this is the particular reel that you broke the seal on and placed on the machine in the basement at 185 Mulberry Street, tapping Patrissy's Restaurant, Canal 6-8854 on July 3, 1964.

A This tape I did place on the machine on July 6, 1964.

[216] Q On July 6, I am sorry. When I said July 3, I meant July 6. On July 6, sir?

A July 6, 1964.

Q Did you take that tape off?

A No, I did not.

* * * *

[259) CROSS-EXAMINATION

BY MR BOUSE:

Q Detective Crawford, how long would you say that you spent on this case totally, in your investigation?

A It's very hard to say. It was on numerous days. I couldn't place it down to hours, sir.

Q Well, I don't expect you to do that.

Would you say that you spent a number of days, numerous days?

A Yes.

Q Would you say you spent thirty days? I don't mean thirty consecutive days, but approximately thirty days of man-hour days, working days on this case.

A It could very well possibly be.

Q Give or take a little more or less, that would be your answer?

A Yes, sir.

Q Now, was your job on this particular case confined to wire taps, wire tap evidence, setting up recorders and so on? Was that your sole function?

A That is correct.

* * * *

[273] Q Now, this equipment, all of this tape recording equipment, this is all purchased by the County, of course, as part of police equipment?

A That is correct, sir.

Q Now, could you give us, Detective Crawford, for example, if you can—and if you can't do it exactly, to the best of your knowledge—the number of reels of tape that were used in this entire investigation—and I am talking about the Holzman situation and all of the facets with regard to outlying bugs and taps. Could you give us the entire number of reels in numbers?

[274] MR. DOOLITTLE: Objection, your Honor. I think that is wholly immaterial.

THE COURT: If he knows. I don't know whether it is immaterial or not at this time. At this point I don't know. Overruled.

Do you know?

THE WITNESS: I don't know definitely how many tapes were used, no, sir.

Q I can appreciate that, Detective Crawford. Do you think this: Do you think that you could hazard an approximation, knowing the number of places—let me ask you this: Just the places that you had something to do with, the office at Tenth Avenue, the phone booth, the Holzman premises, and I think you testified to some other areas that you installed recording equipment at.

A I did, sir, yes, sir.

Q Do you think this—taking into consideration just the things that you had personal knowledge of: Do you think that you can approximate the number of reels that were taken during the entire investigation on this matter?

A I would say over a hundred, maybe more, maybe [275] two hundred; more. Honestly, I have never sat down and actually counted the tapes that were placed on it.

Q Because most of them would be working automatically around the clock and you wouldn't have to be there and they would be changed by people who would go around?

A I understood you to say somebody would have to be there?

Q No. I say you wouldn't have to go there.

A No; they were going twenty-four hours a day automatically.

Q But you say it could come to 200 reels?

A I said a hundred or it could be 200 or more than that. I don't know. I never counted them.

Q Let me ask you: When a reel is taken from the recording device after the tap, you say it is returned to the district attorney's office and you turned it over to a Sergeant Tossig?

A Tozzi, T-o-z-z-i.

Q And he would have continuous possession—I mean you would have continuous possession of it up until that time?

[276] A That's correct.

Q And Sergeant Tozzi would put it away for safekeeping?

A He would.

* * * *

[295] CRAWFORD—REDIRECT

Q Now, I don't know whether or not you testified, but I think Mr. Bouse asked you a question, something about 100 tapes, 200 tapes. Was that an accurate count, sir, or were you guessing?

A It was not an accurate count. I was guessing.

Q Have you any idea, specifically, how many tapes, reels of tapes you yourself or were put on—let me put it this way.

Have any reels of tapes been put on the number Mayfair 1-1290 during the month, say, from June—the pe-

riod from June 9 when you first put the second tape on up to approximately sometime in the middle of July? Do you have any idea?

A I have no idea.

Q You don't know whether it was one, ten—you know it was more than one, because you put one, two, three, four—you had something to do with at least four of them. Could it have been ten, as far as you know?

[296] A As far as I know, it could have been ten, yes.

MR. DOLITTLE: Thank you.

* * * *

[301] JOHN SKUZENSKI, Shield 158, Main Office squad, Nassau County Police Department, called as a witness on behalf of the People, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Detective Skuzenski, you are a detective of the Nassau County Bureau of Division of Detectives, Nassau County Police Department, attached to the District Attorney Rackets Squad; is that correct, sir?

A Yes, sir.

Q How long have you been on the Rackets Bureau?

A Since December 1962.

Q Did there come sometime in 1964, specifically on July 3, 1964, when you, together with Detective Beach, went to the basement of 686 Eighth Avenue, New York City?

A Yes, sir.

Q Now, at that particular time were you present when Detective Beach set up a monitoring device?

A Yes, sir.

Q A wire tapping device, rather.

At that time, Detective Skuzenski, did you place a tape on to the machine that Detective Beach set up?

[302] A I did.

Q I show you People's Exhibit 9 for Identification and I ask you, sir, whether or not this is a tape that you placed on that machine on July 3?

A Yes, it is.

Q 1964. Will you tell me how you identify that tape as being the one that you placed on it?

A I placed my initials on the box.

Q Was the tape a new one or a used one at the time you put it on there?

A It was new.

Q You never took it off, is that correct?

A No, sir.

Q All right. I show you People's Exhibit 4 for Identification—

THE COURT: Just a minute.

What are your initials?

THE WITNESS: J. S.

THE COURT: Where are they?

THE WITNESS: On the back of the box.

THE COURT: All right.

Q Would that be the upper left-hand corner as you look at the back of the box, sir?

[303] A Yes, Sir.

THE COURT: All right, next question.

* * * *

[304] Q Now, as to People's Exhibit 9, were you present at the time that Detective Beach—People's Exhibit 9, that first tape—in the basement of 680 Eighth Avenue, were you present at the time Detective Beach checked the machine to ascertain whether or not that machine was operating properly and recording properly?

A Yes, I was.

Q Incidentally, People's Exhibit 4 for Identification, was that a brand-new tape or was it a used tape when you put it on?

A Brand new. I broke the seal.

Q And you broke the seal on People's Exhibit 9, is that correct?

A Yes.

Q I ask you to pick up People's Exhibit 9 once more, sir.

Did there come sometime on July 15, 1964, when you went to Sergeant Tozzi and requested this particular tape?

A I did.
Q Did you get it?
A Yes, sir.
Q Where did you get it from?
[305] A From a locked cabinet in the office of the District Attorney's Office.
Q Did you open that cabinet or Sergeant Tozzi?
A Sergeant Tozzi opened it and I removed this exhibit.
Q All right. Did you have that tape with you during the day of July 15, 1964?
A Yes, I did.
Q Was it continually in your possession, sir?
A Yes.
Q Did there come sometime when you returned it to Sergeant Tozzi and observed him put it back into this locked cabinet?
A Yes.
Q All right, now, during the time that you had that tape in your possession on July 15, 1964, from the time that you got it to the time that you returned it, did you alter it, change it, amend it, add to it, erase from it in any manner whatsoever, Detective Skuzenski?
A No, sir.
Q Was it in identically the same condition when you returned it as it was when you took it out?
A Yes, it was.
[306] Q You did, however, play it, is that correct?
A Yes.
MR. DOOLITTLE: I have no further questions of Detective Skuzenski at this time.
I will state for the record, as I advised the Court before, I will recall Detective Skuzenski for further testimony.
Accordingly, I will give to Mr. Bouse the grand jury testimony of Detective Skuzenski, sworn to on July 16, 1964, pages 65 to 72 and pages 132 and 131.
MR. BOUSE: With the Court'd indulgence, your Honor, for about a minute.
Your Honor, relying on Mr. Doolittle's promise to bring Detective Skuzenski back, I will limit my cross-examination to the tapes as they were produced.

THE COURT: You are limiting your cross-examination specifically to the evidence that was adduced on direct examination?

MR. BOUSE: Yes.

THE COURT: With, of course, any right and reservation for subsequent cross-examination if, and when he is produced and recalled by the People.

[307] MR. BOUSE: Yes, sir. I am relying on the fact that he will be recalled.

MR. DOOLITTLE: He will be, your Honor. No question about it.

THE COURT: All right. If not, I will let you call him.

MR. BOUSE: Thank you.

CROSS-EXAMINATION

BY MR. BOUSE:

Q Detective Skuzenski, your sole or the sole basis upon which you identified the tapes or the objects that were shown to you by Mr. Doolittle, are your initials on the cartons thereon, is that so?

A Yes, sir.

Q You say that Detective Beach would set up the recording equipment—I am referring to the first exhibit or the first item that you looked at—Detective Beach would set up the recording equipment and you would place the tape on the machine?

A Yes, sir.

Q And of course this is an automatic machine that would go into operation whenever the phone would be used, but would lie dormant when the phone was dormant?

[308] A Yes, sir.

Q And that would alleviate the necessity of a detective being present during the continual operation?

A Yes, sir.

Q Now, could you tell us, Detective Skuzenski, when you set up the first machine on July 3, 1964, at 680 Eighth Avenue in New York City, when did you return to remove the reel?

A I didn't return.

Q Do you know who did?

A I believe Detective Costello.

Q Well, you do know, Detective Skuzenski, that for a period of time the machine, of course, was unattended?

A Yes.

Q It would be working automatically?

A Yes.

Q And, of course, it would be possible for anyone to replace that reel with another reel, wouldn't it, during that period of time?

A No, sir.

Q Why not?

A Where the machine was located it was in a secured area.

[309] Q Well, let me put it this way: If someone found the machine or someone knew where the area was, there would be nothing to prevent him from replacing this reel with another reel, isn't that so?

A Unless they broke into the secured area.

* * * *

Q Let me put it this way, Detective Skuzenski: If someone had access to the place where the recording machine was, it would be possible for him to replace the [310] reel with another reel, isn't that so?

MR. DOOLITTLE: Objection, your Honor, as to the form. Access means a key to the padlock.

THE COURT: Well, just phraseology. See if you can phrase it without combining two aspects.

Q Well, by aspects, Detective Skuzenski, I mean he had a key to the place or he broke in or in some way he got in, if that happened it would be possible for him to replace one reel with another, isn't that so?

A If anyone knew anything about recorders, yes, sir.

Q Well, he just—this is a recording machine that you could buy in any store, isn't it?

A Yes.

Q Nothing particularly complicated about it, is there?

A No.

Q And you could easily—the layman could put another reel on to replace that reel that is already on, isn't that so?

A To appear that it wasn't tampered with?

Q No, I didn't ask you that. If one reel could be replaced by another reel.

[311] A Yes.

Q And, of course, when these conversations would come in, they wouldn't come in with the number being asked for by the caller—I withdraw that.

You never hear the phone number on the tape, do you?

A On an in-coming call?

Q On an in-coming call. You never hear the phone number?

A No, sir.

Q The first thing you hear is the ring and then someone says something?

A Yes, sir.

MR. BOUSE: I have no further questions.

MR. DOOLITTLE: I have further redirect, in a sense, your Honor, because I am reopening my direct. There was something I omitted relative to these tapes.

REDIRECT EXAMINATION

BY MR. DOOLITTLE:

Q At the time that you set up People's Exhibit 9 in the basement of 680 Eighth Avenue, prior to that, did you and Detective Beach do anything relative to obtaining a padlock?

A Yes, sir.

[312] Q Will you tell me what you did?

A I went and purchased a padlock at a hardware store.

Q How many keys did you get with it?

A Two.

Q What, if anything, did you do with that padlock after you purchased it?

A Once the installation was made I put the reel on the tape recorder. When we were ready to leave the

premises I secured this room with the padlock by locking this room that we had the recorder in.

Q What did you do with the keys, sir?

A I turned them over to Detective Costello.

Q Both keys, is that correct?

A Yes, sir.

Q And that is the gentleman sitting right here [indicating]?

A Yes, sir.

Q You didn't keep one of the keys yourself, did you?

A No, sir.

Q You didn't throw one of the keys away?

A No.

[313] Q You gave them both to Detective Costello?

A Yes, sir.

Q You, of your own knowledge, don't know what Detective Costello did with them, is that correct?

A That's right.

Q That was the beginning of a weekend, wasn't it, if you can recall?

A Yes, sir.

MR. DOOLITTLE: Thank you very much.

MR. BOUSE: One other question.

## RECROSS-EXAMINATION

BY MR. BOUSE:

Q Now, Detective Skuzenski, you, of course, secured permission from someone to go upon these premises and padlock this particular area for the tape?

A Yes, sir.

Q From whom?

A Detective Beach handled that part of it.

Q You don't know from whom Detective Beach obtained the permission?

A No. He spoke to someone.

Q Did you see him speak to a person?

A No, I don't think I did. No.

[314] Q Did you see the person at all?

A No, I don't believe I did. No.

Q So this is what Detective Beach told you?
A Yes.
MR. BOUSE: I have no further questions.
MR. DOOLITTLE: Thank you very much, Detective Skuzenski.
I call Detective Costello.

THOMAS COSTELLO, Shield No. 77, Main Office Squad, Assigned to the District Attorney's Office, Nassau County Police Department, being first duly sworn, testified as follows:

DIRECT EXAMINATION

* * * *

[315] BY MR. DOOLITTLE:

Q Detective Costello, you are a detective in the Division of Detectives of the Nassau County Police Department, is that correct?
A That's right.
Q And are you attached to the District Attorney's Rackets Bureau, is that correct?
A Right.
Q How long have you been attached to the District Attorney's Rackets Bureau?
A Approximately since 1960.
Q In the course of your duties as a detective of the Nassau County District Attorney's Rackets Bureau, did you have occasion on July 5, to go to premises 680 Eighth Avenue, New York City, the basement of that premises?
A That is correct.
Q Prior to going there had you received anything from Detective Skuzenski, the previous witness?
A Yes, I had received from him two keys which I would have needed at that location.
[316] Q When you went to that location what, if anything, did you do?
A I went to the location and at that time we had a machine set up in the baggage room. I entered the baggage room with the keys I had available and removed the tape from the machine and at that time replaced it with a new tape.

Q Now, sir, I show you People's Exhibit 9 for Identification and I ask you what if anything you did with that —I withdraw that.

Have you ever seen that before?

A Yes, I have.

Q When for the first time did you see that, sir?

A The first time I saw this tape would have been on July 4, 1964.

Q Where?

A At approximately 1100 hours which is 11 o'clock a.m., at that location.

Q Where did you see it, at 680 Eighth Avenue?

A Yes, sir.

Q How did you gain access to it?

A With the keys that I had.

Q What if anything did you do with it on the 4th of [317] July, 1964?

A At that time I checked the machine to see if it was working properly and the tape at that time did not have to be changed and I secured the room and left.

Q Did you ascertain whether or not the machine was operating properly and was, in fact, recording properly?

A Yes, it was.

Q When did you see it again, People's Exhibit 9 for Identification?

A July 5, 1964.

Q How did you gain access to it at that time?

A I gained it by the keys that I had in my possession, which fit the padlock on the room where we had the machine located.

Q What if anything did you do then, sir?

A At that time I removed the tape from the machine and brought it back to the District Attorney's Office—no, excuse me—that was on a weekend which would have been Sunday, and being that the District Attorney's Office was not open I brought the tape home with me.

Q Did you secure it in your home?

A Yes, I did.

Q Where did you secure it in your home?

[318] A. I kept the tape where I keep my guns.

Q Does anybody have access to that place other than you?

A No, sir.

Q Do you have children, incidentally, Mr. Costello?

A Yes, I do.

Q Did you take the tape away from the place after any time thereafter, People's Exhibit 9 for Identification, from the place where you keep your guns?

A Yes, I did.

Q When did you take it?

A That would have been Monday morning, July 6, at which time I brought it to the District Attorney's Office for safekeeping.

Q What if anything did you do with the keys that you had?

A I returned the keys to Sergeant Tozzi.

Q During the time that you had that tape in your possession, Detective Costello, did you do anything to change it, to add to it, to detract from it, to erase on it, to do anything whatsoever to that particular tape?

A No, sir.

[319] Q At the time that you turned it over to Detective Sergeant Tozzi, was it in identically the same condition when it was when you removed it from the machine in premises 680 Eighth Avenue, New York City?

A Yes, it was.

* * * *

[320] Q Incidentally, when you gave People's Exhibit 9 for Identification to Detective Tozzi, what if anything did he do with this?

A He also put that in the cabinet underlock.

Q And secured it again?

A Yes, sir.

* * * *

[321] Q Now I show you People's Exhibit 9 for Identification and ask you how you identify doing what you did to that particular tape.

A On the back of the box is indicated the time and the date, and next to it is my initials T.C. indicating that I would have removed this tape from the machine.

MR. BOUSE: Your Honor, may we have a continuing objection to Detective Costello's testimony and, of course, [322] Detective Skuzenski's testimony at this time inasmuch as it is incompetent, irrelevant and immaterial.

THE COURT: I overrule your objection but I will admonish the jury: No connection at this time with the defendant. You understand that?

MR. BOUSE: I respectfully except.

* * * *

[338] THE COURT: Well, no, pass them up.

Q Well, let me ask you this: Detective Costello, you are familiar with each and every one of the tapes on People's Exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 9 for Identification, am I correct?

A Yes, I am.

[339] Q Did there come sometime at my request and in my office that you gave these to some person?

A Yes I did.

Q Now—

THE COURT: Well, now, just a minute. All right, go ahead.

Q Prior to your giving them to some person, did you obtain them from some place?

A Yes, I did.

Q This is People's Exhibits 1, 2, 3 ,4, 5, 6, 7, 8, 9, for Identification—I'm sorry and 10 for Identification.

A 10.

Q Including 10 for Identification?

A Yes sir.

Q You know which one that is?

A Yes sir.

Q Did you do that on instructions from me, sir?

A Yes.

Q Where did you obtain these particular tapes prior to bringing them into my office, pursuant to my request?

A From Sergeant Tozzi.

* * * *

[341] Q Detective Costello, I ask you to look at People's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 for Identification and I ask you sir, at sometime in the month of September 1964 did you see those particular tapes?

A Yes, I did.

Q Did you see them pursuant to orders that you got from me, sir?

A Yes, sir.

Q Will you tell me where you got them and where you saw them for the first time.

A Around September 11, 1964, I received these tapes, on request from Mr. Doolittle, from Sergeant Tozzi.

Q Did you see where Detective Sergeant Tozzi got them from?

[342] A From the cabinet in our office, which is secured by lock and key.

Q What, if anything, did you do with those tapes when you got them from Detective Sergeant Tozzi?

A At that time these tapes were handed to Don White, the court stenographer, and he kept them in his possession until about September 28, 1964, at which time transcripts were made from the recordings on these tapes.

Q All right. You got them from Detective Sergeant Tozzi, is that correct, sir?

A That's correct.

Q Did you bring them into my office at my request?

A I believe I brought them into your office and Don White was present at the time.

Q At that particular time did you hand over People's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 for Identification to Donald J. White?

A Yes, I did.

Q You know him to be a confidential reporter for the District Attorney's Office? He works a little machine like Mr. McGrath, a stenotype machine, is that correct?

A That's correct.

[343] Q All right. That was on September 11, 1964?

A When I received them, September 11.

Q When you received them and gave them to White. Did you see them thereafter, up until a certain point?

A I didn't see them again until they were returned to me by Don White approximately September 28, 1964.

Q When he returned these particular exhibits, People's 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 for Identification, did he

also return or give to you certain other things in my presence, in my office?

A Yes. When he returned the tapes he also returned or gave us a transcript of the conversations that were on these tapes.

Q Thereafter, did you take these exhibits, People's 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 for Identification, and return them to Sergeant Tozzi and have them placed in a place for safekeeping?

A I did.

Q Were you present when I took the transcripts and put them in a safe place in my office?

A Yes, I was.

Q Now, there came sometime when in preparation for this case you were assigned to me to assist me in the [344] preparation of this case, am I correct, Detective Costello?

A That's correct.

Q And on one or more occasions witnesses came in, is that correct, sir?

A That's correct.

Q Do you ever recall Irving Holzman coming in on more than one occasion to my office?

A Yes, he has.

Q On those occasions, on request from me, did you obtain People's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 for Identification, and bring them into my office while Mr. Holzman was there?

A Yes, I did.

Q Did these Exhibits 1 through 10, inclusive, ever leave your possession during that time?

A No, they did not.

Q Did you play those tapes, People's 1 through 10, inclusive, for Mr. Holzman in my presence?

A Yes, I did.

Q At the time you played them, in the presence of Mr. Holzman, did you also present to him transcripts which I had in my possession?

A Yes, I did.

[345] Q All right. Did we do this on more than one occasion?

A Yes, we did.

Q At any time that you ever had possession of these tapes when Mr. Holzman was in the office or any other witnesses were in the office, did you ever do anything to add to these tapes, to detract from these tapes or erase from these tapes, to overplay on these tapes, to cut these tapes or alter or amend or change these tapes in any manner whatsoever?

A I did not.

Q At any time that you had these tapes and you returned them, were they in identically the same condition when you returned them as they were when you got them, sir?

A Yes, they were.

Q During last week at the request of myself and Donald J. White, did you do anything relative to those particular tapes, People's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 for Identification?

A Yes. Last week I believe it was last Thursday, when we didn't have any court, Mr. Holzman, the complainant came into the office and at that time the tapes were played for him.

[346] MR. DOOLITTLE: I have no further questions, your Honor. I will present to Mr. Bouse, the grand jury testimony of Detective Costello, sworn to July 16, 1964, pages 91 through 94.

THE COURT: All right. The record will so indicate.

## CROSS-EXAMINATION

BY MR. BOUSE:

Q Detective Costello, would you say that you had more to do with the setting up of the machines and the subsequent recordings of the conversations than any other detective in the Rackets Squad of the District Attorney?

A Well, I would say that—if I can answer the question this way—I would say that I had probably more to do with listening to these tapes or having them played for Mr. Doolittle, for a witness or a complainant, as we prepared this case.

Q Well, if you can give an exact figure, do so. If you can't, could you give us the approximate number of reels that were employed in the entire operation, from its beginning to its end?

A In reference to the overall investigation of this case?

[347] Q That's right, including monitored conversations, taps, bugs, phone booths, Mr. Holzman's basement, his office, all of them, the headliner, whatever.

A Well, I could maybe give you an example. From June 9, 1964, up to July 2, 1964, which is a little less than a month, we had taken off of that phone eight tapes.

Q Off of one phone?

A Off the one phone.

Q Now, could you—

MR. DOOLITTIE: Which phone was that?

Q Which phone were you referring to?

A That was the phone MA 1-1290, which would be in the complainant's home, Mr. Holzman.

Q That would be eight tapes from his home. Could you tell us how many tapes were taken from the phone booth in the drugstore, that we have discussed?

A To my knowledge, there were two tapes.

Q Only two from the drugstore.

* * * *

[351] Q Now, will you tell us, Detective Costello, how many reels were removed from the tap on the Headliner Bar?

A I have no idea.

Q Could you hazard a guess?

A It would be very hard to say.

Q Would you say it was one hundred?

A I doubt if it would be one hundred.

Q Certainly over fifty?

A No, it's probably less than fifty.

Q Would you say it was more than thirty-five?

A If I was to guess, I'd say maybe ten or fifteen.

Q Ten or fifteen from the Headline Bar?

A And that would be strictly a guess.

Q Would you know where these reels are now, Detective?

A No, I have no idea where they are.

Q Well, let me ask you, Detective: Would the reeel be discarded if in the opinion of the detective who listened, to it it contained nothing valuable?

A No. When we work on a case, an investigation, all the reels are kept.

Q No matter how inocuous they may appear?

[352] A That's correct.

Q So that this ten or fifteen reels from the Headliner Bar are not in the custody of the District Attorney's Office?

A They could very well be.

Q Well, is there any doubt in your mind, Detective?

A No.

Q That they are in the custody of the District Attorney, and could be produced if it was necessary?

A Yes.

Q Now, we have discussed Holzman's home and we have discussed his office and we have discussed the phone booth and the Headliner Bar. Now, was there any other place where a tap with recording devices was set up?

A I know there was one set up on Patrissy's Restaurant.

Q Did you have something to do with the setting up of that tape?

A No, I had nothing to do with setting up of any taps?

Q Could you do this, Detective: Could you estimate the number of reels that might have been taken from the [353] taps set up at Patrissy's Restaurant?

A I have no idea.

Q Would you say again it might be something like ten or fifteen as of the Headliner?

A Could be; could be less, could be more. I have no records to indicate exactly how many taps were taken off any tap.

Q And, again, of course, whether they were inocuous or not, they would now be in the custody of the District Attorney's Office?

A That is our policy, to hold on to those taps until such time as the case is disposed of.

Q And there is no reason in this particular case to vary that policy?

A No.

Q Now, do you know of any other place, Detective Costello, where a tap and recording device were set up?

A Not to my knowedge. I have no other idea of any other places that have been tapped. I have nothing to do with them if they were.

* * * *

[354] Q Now, how many tapes—and I am talking about specific conversations such as we have referred to on the prior questioning—would you say you listened to, yourself, personally? On replay, I am talking about.

A Well, I have heard every tape that is on the table right now. I believe it's ten tapes.

Q Would you say you heard all of the tapes that were taken during the entire investigation, the ten or fifteen from Patrizzy's, the ten or fifteen from the Headline? Would you say that you heard the total amount of tapes that were consumed in the investigation?

[355] A No, sir, I didn't.

Q Now, do you know who made the selection of the tapes that you heard? Was it Mr. Levy?

A I have no idea who actually made the selection of what tapes that I listened to.

Q A selection fas made, though, Detective Costello, isn't that so?

A Yes.

Q Selection of tapes were made. Do you have any idea who made the selection?

A Well, it would have been either my immediate boss, Sergeant Tozzi, or one of the Assistant District Attorneys in the Rackets Bureau handling the investigation.

Q Now Sergeant Tozzi is more or less the custodian of this material, isn't he?

A He is also my immediate boss, plus having control of the tapes.

Q Well, it isn't his job to determine their substantive value, is it?

MR. DOOLITTLE: Oh, if your Honor please—

Q If you know.

MR. DOOLITTLE: I am going to object.

THE COURT: Sustained.

[356] MR. DOOLITTLE: It's always a lawyer's function—

THE COURT: Sustained, sustained.

Q Now, did you have anything to do with a tap that was set up on the District Attorney's phone, over which a call was made by one Joe Albino?

MR. DOOLITTLE: Objection, your Honor. There is no such testimony that any such—

MR. BOUSE: I withdraw it.

MR. DOOLITTLE: He is assuming there was such a tap.

THE COURT: I will take care of that.

Yes or no,

THE WITNESS: No.

THE COURT: All right, the jury will disregard the question and the answer competely.

Q I'll ask you this: Do you know of your own knowedge whether such a tap was set up?

A To my knowledge, no. I have no idea.

Q Now, when you removed or when you were in the process of removing the tape from the Holzman basement, did you on that occasion play the tape for any member of the Holzman family?

[357] A No, I did not.

Q Did you at any time play the tape back on the bugging of the Holzman office? I am not talking about when we were in the District Attorney's Office, I mean at Holzman's office the day that the tape was made.

A That tape was removed from the machine and brought—in fact, it was brought right back to the District Attorney's Office. It was not played there.

Q It was not played for Holzman at that time?

A No.

Q Did you have anything to do with the removing of the two tapes from the phone booth?

A No, I did not.

Q So you don't know of your own knowledge whether they were played for Mr. Holzman?

A At that time, no, I wouldn't know.

Q But there did come a time when all the tapes were played for Mr. Holzman, at least all the ones that you see on the table there?

A That's correct.

Q And was this done more than once?

A Yes, it was.

Q Would you characterize this operation as unusual?

[358] MR. DOOLITTLE: Objection, your Honor.

THE COURT: Sustained.

Q Now, Detective Costello, are there duplicates of these tapes?

A No.

Q You know that for a fact?

A Yes, sir.

Q These are all original tapes?

A Yes.

Q And they are the only ones that exist?

A That's correct.

Q Now, did you ever play any of these tapes for the defendant?

A No, I did not.

Q Were you ever present when any of these tapes were played for the defendant?

A No, I was not.

* * * *

FRANK VEDDER, Shield 184, Nassau County Police Department, assigned to the district attorney's rackets bureau, called as a witness in behalf of the People, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Detective Vedder, you are a detective of the division of detectives of the Nassau County Police Department attached to the district attorney's rackets bureau; is that correct?

A Yes, sir.

Q How long have you been assigned to the D.A.'s rackets bureau?

A It is close to five years, sir.

[363] Q Did there come some time prior to September 1964—sometime after July 5, 1964, when you were ordered by Mr. Norman Levy to listen to and monitor People's Exhibit 9 for Identification, tape RC 05 R1?

A Yes, sir.

Q How do you identify the fact that you listened to and monitored that tape recording?

A I have my initials on the box.

Q Is that the procedure in the district attorney's office—the detective who monitors it puts his name on it?

A Yes, sir.

Q Do you also happen to know that Detective Skuzenski and Detective Costello aso listened to that particular tape on occasions other than when you listened to it?

A Yes, sir.

Q Let me ask you: Where did you get this tape when you were ordered to monitor this particular tape, People's Exhibit 9 for Identification?

* * * *

[364] A I would get this tape from Sergeant Tozzi, the commanding officer of the squad.

Q Did you see where he got it from?

A Yes, sir.

Q Where?

A From a locked cabinet in the office.

Q Do you know who has the key to that?

A Yes.

Q Who?

A Sergeant Tozzi.

Q Did you get it that way? Is that how you got it—from Tozzi after he unlocked the cabinet?

A Yes, sir.

Q During the time that you took it from Detective—let me withdraw that.

Did there come some time that day when you returned it to Detective Sergeant Tozzi?

A Yes, sir.

Q Was it continually in your possession from the time that you got it from Detective Sergeant Tozzi until the time you returned it to Detective Sergeant Tozzi?

A Yes, sir.

[365] Q Did you see what Detective Sergeant Tozzi did with it when you returned to to him that day?

A Yes, sir.

Q What did he do with it?

A He put it back in the cabinet and locked it.

Q Fine. Now, during the time that you had it continuously in your possession did you do anything to that reel of tape to alter it, change it, add to it, erase it, amend it or change it in any way whatsoever?

A No, sir.

Q When you returned that tape to Detective Sergeant Tozzi was it in identically and exactly the same condition as it was when you received it from Detective Sergeant Tozzi?

A Yes, sir.

* * * * *

MR. DOOLITTLE: Excuse me. For the record, this witness did not testify before the grand jury, your Honor.

THE COURT: All right.

[366] MR. BOUSE: May we still have a continuing objection based upon the order of proof upon which the prosecution is proceeding and we respectfully except to the overruling.

THE COURT: Yes.

## CROSS EXAMINATION

BY MR. BOUSE:

Q Detective Vedder, do you know yourself approximately how many reels were obtained in the entire investigation?

A No, sir.

Q Do you know the total number of places where taps or bugs or monitored setups were accomplished?

A No, sir.

Q Do you know whether at any particular time with reference to the particular investigation of this case there was a tap set up on the district attorney's office phone?

A No, sir.

Q You don't know?

A Not to my knowledge.

Q Do you know of your own knowledge whether there [367] was a tap set up on the phone of Audrey Graziano?

A No, sir.

MR. DOOLITTLE: Objection; wholly immaterial.

THE COURT: I don't know but he says no, sir, and that is the answer.

Q Or Rocky Graziano?

A No, sir.

Q You don't know?

A I don't know, sir.

Q Did you have anything to do with this investigation, Detective, other than the tape you are talking about?

A No; I just monitored this tape, sir.

Q And that was the sole amount of contact you have had with this particular case?

A To the best of my knowledge, yes, sir.

Q The picking up of this tape from where it was?

A From the sergeant.

Q From the sergeant? In other words, you don't have any other information with regard to that tape other than you conveyed it?

A Monitored the tape, sir.

[368] Q What voices are on the tape?

A I don't know, sir.

Q You just heard voices?

A Yes, sir.

Q Do you know the number of the phone, the phone number that was involved on this particular tape?

A I don't recall, sir.

Q Where were you physically when you were monitoring the conversation?

A In the office, in the rackets bureau office.

Q In the district attorney's office?

A Yes, sir.

Q Was this a conversation that was being held on one of the district attorney's phones that you were monitoring?

MR. DOOLITTLE: Objection.

THE COURT: SUSTAINED:

* * * *

[369] BY MR. BOUSE:

Q Detective Vedder, the monitoring you did on this occasion, was there a conversation that was being conducted on one of the district attorney's phones?

A I don't understand you.

Q Well, you were doing it in the district attorney's office?

A Yes.

Q And was it a live conversation, so to speak?

A No, sir.

[370] MR. DOOLITTLE: That is not what has been testified to.

THE COURT: Just object. Sustained.

Q What I am trying to find out is, do you know where the two points of the conversation were, from where to where of the one you monitored.

A I don't recall them right now, sir.

Q But it wasn't a call that was coming into or going out of the district attorney's office?

A No, sir.

Q But you don't know where the conversation was?

A No, sir.

MR. BOUSE: I have no further questions.

## REDIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Just to get this straight: At the time that you got this tape from Detective Sergeant Tozzi there were already conversations on it. Is that correct?

A Yes.

Q And you just played it, and that is what you mean by monitoring it? You listened to this conversation; am I correct?

[371] A Yes.

Q The conversations that were on there; correct?

A Yes, sir.

Q Then you returned the tape to Detective Sergeant Tozzi; correct?

A Yes, sir.

Q So that during the time you had it you did nothing to this; it was identically in the same condition when you returned it as when you got it; correct?

A Yes.

Q It wasn't a tape of a conversation that was going on while you were sitting there with earphones listening to somebody who was actually at the same time making a telephone call?

A No, sir.

MR. DOOLITTLE: Fine.

* * * *

[393] MR. BOUSE: Your Honor, may the record indicate a continuing objection because no foundation has been laid for any of this testimony with regard to the defendant, Thomas Kaiser.

THE COURT: You have an objection. I am overruling the objection with the additional admonition, you understand that there is absolutely no connection here with the defendant at this time where any of this foundation is being laid. You are not to infer it. Any question in anybody's mind? All right.

MR. BOUSE: Thank you, your Honor. I respectfully except.

THE COURT: Yes.

[394] DONALD J. WHITE, residing at 247 North Delaware Avenue, North Massapequa, New York, called as a witness on behaf of the People, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Mr. White, by whom are you employed and in what capacity?

A I am employed by the District Attorney of Nassau County, under the title of Confidential Reporter.

Q I see. What are your duties as a confidential reporter of the District Attorney's staff?

A I do the verbatim reporting and transcription of the Nassau County Grand Juries, question-and-answer

statements taken in connection with D.A. investigations and transcriptions of tape recordings.

Q Will you give us something of your experience and qualifications in this particular field, Mr. White.

A I am a certified shorthand reporter. I was certified in 1959 by the State of New York. I had two years' experience in court reporting in the United States Army, four years' experience as a freelance reporter at which time I had various per diem assignments with almost [395] every court in the state, examinations before trial, board of directors, stockholders' meetings, conventions and conferences. In 1963 I came to the District Attorney's Office.

Q Have you testified as an expert on transcriptions that you have made of tape recordings, sir?

A Yes, sir, I have, in the County Court and the Supreme Court of Nassau County.

Q Now, sir, did ther come sometime, specifically September 11, when you were in my office together with Detective Costello?

A Yes, September 11, 1964.

Q Did Detective Costello do something to you at my request, in my presence, in my office?

A Yes, sir. He delivered to me tape recordings.

Q I show you People's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, and ask you whether or not, in fact, those are the tape recordings that were given to you by Detective Costello on September 11 in my office.

A Yes, sir, these are the tapes. I identify them by my initials and number that I placed on them.

Q All right, fine. Now, pursuant to my orders, did you do something relative to People's Exhibits 1, 2, 3, [396] 4, 5, 6, 7, 8, 9 and 10 for Identification?

A Yes. I transcribed certain conversations that were on these tapes.

Q Certain meter readings, is that correct?

A Right.

Q Now, will you tell the jury mechanically what you did in transcribing the metered readings on those People's Exhibits 1 through 10, inclusive?

THE COURT: You understand this is not the substantive part, this is just the probable aspect.

THE WITNESS: Yes, your Honor.

A Take one tape recording at a time and place it on the recorder with a set of head phones. I had been given the reading number where the conversation started and where it ended, approximately; listened to the recording initially without taking anything down. Then I take it down by means of a stenotype machine, which you see the court reporter has here. After I do that I again replay the conversation and make corrections, additions or deletions on the tape. At that point I make a typewritten rough draft and then again listen to it and make corrections, deletions or additions on the rough draft. It may be—on some of these you may have to listen to them many [397] times before you get a complete transcript. When it is complete it is then put on a stencil, run on a mimeograph machine and at the end of that time, when they are run off and collated, then I listen to it again. If I find anything else at that point I ink it in and initial it, and this was the procedure with every one of these.

MR. DOOLITTLE: Now I ask that this piece of paper be marked People's Exhibit 1-A for Identification.

[Paper referred to received and marked People's Exhibit 1-A for Identification.]

THE COURT: Do you have any offers? Do you want to offer them seriatim?

MR. DOOLITTLE: I am going to offer them 1-A, etc.

THE COURT: All right, fine.

Q Mr. White, I ask you to look at People's Exhibit 1-A for Identification and I ask you to also look at People's 1 for Identification, I think that's the top one, and I ask you if pursuant to my request you made a transcript of People's Exhibit 1 for Identification, the tapes, specifically meter readings 179 to 202.

A Yes, sir, I did.

* * * *

[408] Q Let me ask you this: In regard to People's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 for Identification, during the time that you had all these exhibits, Mr. White, were they continually in your possession?

A Yes, sir.

Q Did anybody else ever have access to People's Exhibits 1 through 10, inclusively, for Identification?

A No. When I am not working on them—I only work on them one at a time—I kept them in a locked cabinet.

Q And who has the key for that?

A I have the key for that cabinet.

Q During the time you had People's Exhibits 1 through 10, inclusive, for Identification, did you at any time make any alterations, changes, additions, erasures, obliterations or did you alter, amend or change or do anything whatsoever to those tapes?

A No, sir.

Q When you returned those tapes, People's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 to Detective Costello, were they exactly and identically in the same condition as they were when he gave them to you, sir?

A Yes, sir, they were.

* * * *

[417] I ask that this be marked People's Exhibit 9-a for Identification.

(Transcript referred to marked People's Exhibit 9-a for Identification.)

Q I ask you to look at Peple's Exhibit 9-a for Iden-
[418] tification and I ask you pursuant to my request did you listen to meter reading 137 to meter reading 306 in People's Exhibit 9 for Identification and whether or not in fact People's Exhibit 9-a for Identification is an accurate transcription of that meter reading.

A Yes, sir, it is.

Q And did you do that in the same manner that you did the others that you previously testified to?

A Exactly.

Q And this is an exact transcription?

A Yes, it is.

Q Let me ask you, sir: How many voices in that conversation, if you can recall?

A Two voices, number 1 and 2, plus an alphabetical designation of A.

Q Where 1 reoccurred you relabeled it 1, and where 2 reoccurred you labeled it 2; right?

A Right.

MR. DOOLITTLE: I ask that this be marked People's Exhibit 9-b for Identification.

(Transcript referred to marked People's Exhibit 9-b for Identification.)

[419] Q I ask you to look at People's Exhibit 9-b for Identification and also People's Exhibit 9 for Identification and I ask you, sir, whether or not People's Exhibit 9-b is an accurate transcription of meter reading 480 to 818 on People's Exhibit 9 for Identification which you did pursuant to my request.

A Yes, sir, it is, and it was done in exactly the same manner; two voices, numbers 1 and 2 plus an alphabetical designation of A.

Q And where 1 reoccurs you relabeled it No. 1, and where 2 reoccurs you relabeled it 2; is that correct?

A Yes.

MR. DOOLITTLE: I will take that back if I may. Now I ask that this be marked People's Exhibit 10-a for Identification.

(Transcript referred to marked People's Exhibit 10-a for Identification.)

Q I ask you to look at People's Exhibit 10-a for Identification and I ask you whether pursuant to my request you made a transcription from People's Exhibit 10 for Identification of meter reading 202 to 223, and whether or not People's Exhibit 10-a for Identification is an accu-

[420] rate transcription.

A Yes, sir, it is.

Q Did you make that in the same manner as the others that you previously testified to?

A Yes, sir, I did.

Q And how many voices appear on that particular telephone conversation?

A Two voices, 1 and 2, plus an alphabetical designation of A.

MR. DOOLITTLE: I will take that back and I have on further questions of Mr. White.

THE COURT: Any questions, Mr. Bouse?

MR. BOUSE: Just a few.

MR. DOOLITTLE: There is no grand jury testimony, I don't believe, of Mr. White.

THE COURT: Let the record so reveal.

## CROSS EXAMINATION

BY MR. BOUSE:

Q Mr. White, when you are called the confidential reporter for the district attorney's office, that means you keep secrets for the district attorney's office?

MR. DOOLITTLE: Objection, your Honor.

[421] THE COURT: Sustained.

Q Let me put it this way, Mr. White: You keep everything confidential?

A Yes, sir.

Q That's better. All right, let me ask you this: Did you read or monitor any other tapes than the ones you have talked about in connection with this particular case?

A No, sir.

Q You are sure of that?

A Yes, sir.

Q You listened to ten reels and that's all?

A Yes, sir.

Q Now, some of the conversations you heard—I'm sorry, do you want to say something?

A Is it ten reels?

Q I think it is ten—or whatever the number is.

A Yes.

Q Whatever were discussed here is the total number that you monitored during or with reference to this particular case?

A That's right.

[422] Q You transcribed only certain portions of these reels or the entire reel?

A No; just the meter readings that I received.

Q In other words, you would be given a reel and told which portion of the reel to transcribe?

A Right.

Q Now, I know this is a tough question, Mr. White, and maybe you can and maybe you cannot answer it. But if you can will you tell us: Do you have any percentage of the entire number of reels that you wound up transcribing and say like "I probably wound up transcribing fifty percent or thirty percent or ninety percent."

THE COURT: Do you understand the question?

Q. Let me reverse it and put it this way: Can you tell us what percentage of the total number of reels you didn't transcribe?

MR. DOOLITTLE: Objection. How would this man know how many reels there were?

MR. BOUSE: He got through saying there were ten.

THE COURT: Only as to form—if you can, rephrase [423] it. Do you understand what he is saying to you?

THE WITNESS: I think so, your Honor.

THE COURT: Try it again.

Q Let us put it this way: You testified that you transcribed reels numbered one through ten.

A Right.

Q And that you only—.

MR. DOOLITTLE: Well, your Honor, that is not correct.

THE COURT: Do you object to that?

MR. DOOLITTLE: Right.

THE COURT: Sustained.

Q How many reels did you transcribe?

BY THE COURT:

Q To those metered portions of the reels 1 through 10 marked for identification, did you have one hundred per cent transcription of the metered portions which you were asked to transcribe?

A Yes, sir.

THE COURT: Is that what you wanted to ask?
MR. BOUSE: That may be but I don't know.
THE COURT: Go ahead.

[424] BY MR. BOUSE:

Q Were there portions of the reels that you didn't transcribe?
A Yes.
Q Could you give us what percentage of the portions of the reels that you didn't transcribe?
THE COURT: If you know.
A No.
Q Now, of the reels that you did transcribe, although you say you don't characterize anything in your transcription—is that correct?
A Right.
Q But upon listening to them you could tell whether some were in a serious vein and whether some were in a humorous vein, weren't they?
MR. DOOLITTLE: Objection.
THE COURT: Overruled. Listen to the question. Do you understand that question?
THE WITNESS: I understand it so far, yes.
Q Would you say that some were serious and some were humorous?
THE COURT: Just a minute. The objection is sus-
[425] tained.
MR. DOOLITTLE: I will withdraw my objection.
THE COURT: No. I am only sustaining it on the ground that we didn't get an answer to the first question. Will you read the first question.

(Applicable question read by the reporter.)

THE COURT: This is the question where there was no answer. I will sustain the objection to the question and strike it out.

BY MR. BOUSE:

Q Could you tell from your listening to all the tapes that you testified to that there were some that were obviously humorous and some were obviously serious?

MR. DOOLITTLE: I have no objection.

A I felt that they were all serious.

Q You felt they were all serious?

A Yes.

Q You didn't hear anything in a humorous vein on the tapes—is that your testimony?

A In my own personal opinion, no.

[426] Q Well, let me ask you this: Did you make any mistakes on the original transcripts?

A The original transcripts?

Q Well, you made a set of transcripts, isn't that so?

A Yes.

Q And then you sought to correct them?

A Yes.

Q That would indicate that you made some mistakes on them, is that so?

A Yes.

Q Now, how many mistakes would you say you made on the original transcripts?

A Do you mean the original, the finished product?

Q No, the ones that you made. You made the original transcripts in September of 1964, isn't that so?

A Oh, yes.

Q Then didn't you testify that you came to Mr. Doolittle and said, "Look, I'd like to correct some of those"?

A No. Let me correct that—

Q Go ahead, you tell us.

[427] A At that time, in September of 1964, I had made the corrections in ink and initialed them. Last week I took those pages which had ink corrections on and retyped them and Xerozed them, photocopied them so that they would have a neater appearance. In other words, it's still a correction but it's typed in now instead of being inked in.

Q In other words, you made mistakes and you corrected your mistakes?

A Yes, sir.

Q And that was upon rehearing the tape?

A Not last week. This is upon rehearing the tape in September.

Q I'm talking about the inked corrections.
A Yes.
Q That was upon rehearing the tape?
A Yes.
Q Now, do you think, Mr. White, if you reheard the tape a few more times you might find a few more corrections to make?
A To the best of my ability I don't think so because I put in an enormous amount of time on this job.
Q And you didn't seek to characterize any of the [428] conversation?
MR. DOOLITTLE: Well, I think, your Honor, that's been answered. He said he characterized them as being serious.
THE COURT: Let him answer.
Overruled.
Yes or no.
A No, sir.
Q You said you didn't seek to characterize any of the conversation. In other words, if there was laughter you would put down laughter?
A I would. If there were laughter I would put laughter.
Q Do you use the designation h-a-h?
A Yes.
Q H-a-h?
A Yes.
Q For laughter?
A Yes.
Q Did you do that on any of the transcriptions you made?
A Yes.
Q Think about it a minute.
[429] A Yes, I think so.
Q Those were humorous transcriptions where you put h-a-h, h-a-h, weren't they?
A Again, my personal opinion, Mr. Bouse—.
Q I didn't ask your personal opinion. Did you hear laughter?
MR. DOOLITTLE: I am going to object.

THE COURT: Overruled. No, no, I am sustaining the objection. He has to answer the question.

Q There were transcripts that you made where you designated laughter with h-a-h and h-a-h?

A Right.

Q Do you remember those particular transcriptions involving Thomas R. Kaiser with the laughter?

A Yes.

MR. BOUSE: Thank you. I have no further questions.

REDIRECT EXAMINATION

BY MR. DOOLITTLE:

* * * *

[436] Q Mr. White, in response to a question by Mr. Bouse, I believe you testified that where there was laughter you designated it as such, is that correct?

A Yes, sir.

MR. BOUSE: I'll object to that. I don't think that was the testimony.

MR. DOOLITTLE: I think that was specifically the testimony.

THE COURT: Well, I would sustain the objection only as to form.

BY THE COURT:

Q Let me ask you: When you listen to one of these tapes, do you professionally have some designation that you place where you have such a thing as laughter?

A Yes, your Honor.

Q How would you designate—is there a professional term?

A Might I say this, your Honor: If it is a laughter which cannot be described phonetically, there would be a parenthetical note, laughter.

THE COURT: Does everybody know what phoneti-

[437] cally means? All right.

A If it is a laughter such as ha-ha or ho-ho then it is put down that way, phonetically.

Q And if you can't do it, what do you do? If you can't put it down phonetically anywhere—

A Then it's a parenthetical note, laughter.

Q Laughter?

A Yes.

Q What does h-a-h mean?

A That's the sound heh and twice would be heh, heh, which would be—as I say, I can't characterize it, so that's what it sounds like.

Q So that if it was ho-ho, you would put h-o, h-o?

A Yes, your Honor.

THE COURT: All right.

BY MR. DOOLITTLE:

Q And I think—am I correct, that there was such conversation that you did put either ha or ho, if it was ho, or laughter if it was nonphonetic?

A Correct.

Q But, in any event, is it your testimony that your impression is that none of these tapes, that there was [438] anything humorous about it?

MR. BOUSE: I am going to object.

THE COURT: Sustained. Strike it out.

MR. DOOLITTLE: May I be heard?

THE COURT: No.

MR. DOOLITTLE: That was brought out on cross-examination.

THE COURT: No. The jury will disregard any comments by either counsel as to what his interpretation was except what he did as a professional.

In other words, you have not on any of these transcripts in any way, shape or form indicated your opinion as to what interpretation you made of what you were transcribing?

THE WITNESS: No, your Honor.

THE COURT: All right. That's it.

MR. DOOLITTLE: Your Honor, may I just have a portion of Mr. Bouse's cross-examination reread?

THE COURT: I remember it very clearly. I have it in my notes. I have just admonished the jury.

You will understand, members of the jury. Any questions in anybody's mind?

[439] MR. DOOLITTLE: Your Honor, could we approach the bench so I can argue this point?

THE COURT: No. Sit down.

MR. DOOLITTLE: Well, I have no argument, your Honor.

THE COURT: You have an objection. It is on the record.

MR. DOOLITTLE: Well, my objection is worthless.

THE COURT: All right. That's it.

MR. DOOLITTLE: Let me ask one question. May I proceed this way:

Q Do you recall on cross-examination being asked this question by Mr. Bouse—

THE COURT: Objection sustained. I am not going to—I just ruled, I am not going to have another question in reference to that, period. Sit down.

All right. Do you have any other questions?

MR. BOUSE: Just one.

THE COURT: You heard my restriction to Mr. Doolittle. I don't want you to go into that field again.

MR. DOOLITTLE: I have no objection to him going [440] into that field. He went into it once and I didn't object before.

THE COURT: All right. Have a seat.

## RECROSS-EXAMINATION

BY MR. BOUSE:

Q Mr. White, how would you designate a snicker?

A By the sound.

Q I mean in your transcription, how would you put it in typewritten form?

A Whatever the sound was.

Q If it was a snicker—do you know what a snicker is? You just heard Mr. Doolittle. How would you put that in your transcription?

A I'd actually—I'd have to hear the noise, Mr. Bouse.

Q The noise that you just heard Mr. Doolittle make, how would you put that in your transcription?

A I don't want to be facetious but if he will make the noise again—

Q He just did, Mr. White.

THE COURT: Strike it out. I don't know if you heard anything, madam and gentlemen. Forget it. In other words—

[441] Q Something that isn't a laugh—I'm sorry, your Honor.

BY THE COURT:

Q In other words, Mr. White, any exclamation or verbalization is put down by yourself phonetically?

A Yes, your Honor.

Q And if you can't make it a phonetical indication you make an indication written to the best of your ability?

A Yes, your Honor.

Q Like noise?

A Right. Like noise or indistinguishable.

Q Or laughter that you can't put down phonetically?

A Yes.

BY MR. BOUSE:

Q If it was a snicker you wouldn't put laughter.

A If it sounded like laughter.

Q No, if it sounded like a snicker and not laughter, you wouldn't put laughter.

A No.

Q But you wouldn't put snicker?

A No.

Q And if it wasn't ho-ho or ha-ha, you probably [442] wouldn't put anything, isn't that so?

A Whatever the sound is, Mr. Bouse.

Q You put whatever the sound is?

A Yes.

Q What other symbols do you use besides ho-ho and ha-ha?

MR. DOOLITTLE: If your Honor please, I think this is beyond the scope of recross-examination.

THE COURT: I will sustain that only as to form. I will ask the question. You have already answered it twice.

BY THE COURT:

Q Phonetically is what? You transcribe anything you can hear by the ears phonetically?

A Yes, your Honor.

Q So whether it is hee-hee or ho-ho or anything else, this is a literal phonetical transcription of what you heard?

A Yes, your Honor.

Q And for what you cannot do phonetically, you make some characterization?

A Yes, your Honor. In other words, I wouldn't just let it go by without making some note.

* * * *

JOSEPH TOZZI, Shield 120, Nassau County Police Department, Assigned to the District Attorney's Office, called as a witness on behalf of the People, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Detective Sergeant Tozzi, would you keep your voice up so we can hear you back here?

A Yes, sir.

Q Sergeant Tozzi, you are the commanding officer of the Nassau County District Attorney's Rackets Bureau; is that correct, sir?

A Yes, sir.

Q You have how many detectives under your jurisdiction?

A Nine detectives, two patrolmen.

Q Now, were you the commanding officer of the Nassau County District Attorney's Rackets Bureau back in June, July, September, August—I forgot August—1964, and sometime prior thereto?

A Yes, sir.

Q Were you familiar with the case of the People of [451] the State of New York against Salvatore Granello,

also known as Sally Burns; Dino Conte, also known as Dino Harris; and Thomas R. Kaiser?

A Yes, sir.

Q Did you make various assignments, Sergeant Tozzi, in that particular case pursuant to request of Mr. Norman Levy, the Assistant District Attorney, in charge of the Rackets Bureau?

A I did, sir.

Q Was one of your functions the custodian of tape recordings?

A It was.

Q Will you tell me, sir, where, during that period you kept these tapes and in what manner you kept them?

A They were kept locked in a metal cabinet in my office.

Q Who has the key to that?

A I do, sir.

Q Is that the only key, sir?

A It's the only key.

Q When you go on vacation what, if anything, do you do with that key?

[452] A It's given to my deputy, who is Detective Harold Sheppard.

Q Now, let me show you People's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 for Identification and I ask you, sir, to look at these, if you will. Just look at the outside of that.

A Yes, sir.

Q Do you recognize those tapes as being tapes which were part and parcel of the investigation of the case which I mentioned before?

A Yes, sir.

Q Now, were those tapes, when they were not in the custody of some police officer in your particular squad, in that cabinet for which you have the key?

A They were, sir.

Q What would be the procedure in the event that somebody wanted to get one of these particular tapes?

A They would have to come to me. I, in turn, would open the cabinet and give them the tape or tapes requested.

Q When I say "somebody," could anybody just come in and say, "Sergeant Tozzi, give me the tape"?

A No, sir, definitely not. The man assigned to the [453] investigation would be the man that would get it, the man or men.

Q All right, now, will you look at those particular tapes and do you see that there are certain initials on with an X?

A Yes, sir.

Q Is there any significance to that, sir?

A The man that read the tape, yes.

Q The man that read the tape?

A Read the tape.

Q What do you mean by "read the tape"?

A Well, transcribed the tape. I should be more clear.

Q That's also called monitoring?

A Yes, sir.

Q Is it standard procedure that he is to initial that and put an X alongside of it?

A Yes, sir.

Q That indicates that he is the person who had that tape?

A Yes.

Q How would be the only way he could get that tape?

[454] A From me.

Q What would he do? What would be the only way it would get back in that cabinet?

A To me.

Q Fine. What procedure would you use—assume I'm a detective, tell me, specifically, what I would do if I was assigned to read People's Exhibit 1 for Identification.

A He would have to come to me in my office on the second floor. I keep the key on my person, and in my absence, as I said, it goes to my deputy. This cabinet is on top of another cabinet in my office. I have to go to it, unlock it and give him the tape that he has asked for.

Q Now, you open the door?

A Yes, sir.

Q Do you always take the tape out or are there occasions when he takes the tape out?

A I would say that the majority or the large majority of the time I take it out myself.

Q How about returning it to the cabinet?

A Same way, sir.

Q Same procedure?

A Yes, sir.

[455] Q All right, now, are you familiar with the fact that Detective Thomas Costello was assigned to me in September of 1964 to assist me in trying this case?

A Yes, sir.

Q Can you recall that there were occasions when he requested the tapes and got them?

A Yes, sir.

Q Do you know how many times?

A No, no, I couldn't—I don't recall how many times.

Q Since September of 1964, is Detective Costello the only one you have given these tapes to, and he has returned them to you?

A Yes, sir, definitely.

Q Let me ask you this, Detective Sergeant Tozzi: During the time that you were the custodian of these tapes, at any time when they were in your hands, at any time when they were in the cabinet, did you do anything to change, alter, delete, erase, add, amend, change or effect these tapes in any manner whatsoever?

A No, sir.

Q At all times from the time that you initially got these tapes to the time of today, are those tapes in iden-[456] tically the same condition as they were when you first got each and every tape?

A Yes, sir.

Q You did nothing whatsoever, correct, sir?

A No, sir.

MR. DOOLITTLE: No further questions.

For the record, Sergeant Tozzi did not testify before the grand jury, and, accordingly, I have no minutes to give Mr. Bouse.

CROSS-EXAMINATION

BY MR. BOUSE:

Q Sergeant Tozzi, besides being the custodian of the tapes that might be guarded in an investigation, do you also have custody of the wire tap equipment?

A Yes, sir.

Q Is there anyone over you or do you have sole custody of it, you and your men?

A Well, as far as the custody, would you clarify that, sir?

Q Well, that is your primary function, custodian of the reels that may be gathered during an investigation, plus custodial jurisdiction over the wire tap equipment, the recorders, ear phones, all of the paraphernalia.

[457] A The equipment that goes with it, yes, it's in my custody, in my charge.

Q Now, where was it all maintained, Detective?

A Where is it kept?

Q Yes.

A Quite a bit of the equipment is kept in my office. The remainder, which I don't have room for, is in a locked vault in the basement.

Q Do you have anything to do with the purchasing of such equipment?

A The purchasing? I might recommend but the final word is not mine, no, sir.

Q Well, would you be aware at any given time how much money would be spent on such equipment?

A No, sir.

MR. DOOLITTLE: Objection, your Honor.

THE COURT: Sustained, sustained.

Q Well, let me ask you this: Do you know as a fact that the County of Nassau has spent more money on wire tap equipment in the past year than any other county?

MR. DOOLITTLE: Objection.

THE COURT: Sustained.

Don't answer the question.

[458] Q Let me ask you this, Detective Tozzi: Do you have anything—

MR. BOUSE: I'll tell Mr. Doolittle the question if he will sit down.

MR. DOOLITTLE: Thank you, Mr. Bouse.

Q Do you have anything to do with the selection of the tapes that would be used in a particular prosecution?

A The selection of the tapes?

Q Yes. In other words, if you were to assign a particular reel to a monitoring for a particular detective, is that right?

A Yes, sir.

Q And you would ask him to note the footage upon which a particular name would arise, for instance?

A All the footage of the different conversations, as a rule.

Q And would you receive back notations from the detective who monitored the reel indicating where, what could be found on the reel?

A The transcription, yes, sir.

Q That's what it boils down to.

Now my question to you is this: Would you know, if [459] it isn't yourself, who makes the selections for the reels that are going to be used in a particular prosecution?

A Well, I do not make the selections. That would go, naturally, to the District Attorney's Office, sir.

Q You have absolutely no concern with the substantive content of a particular reel?

A I have the concern in that I want it promptly and I want it all on there, but mine is not—I don't make the final judgment. It would be the Assistant District Attorney who is handling the case.

Q Now, in this particular case, would you say that—I withdraw that and ask you:

How many reels were held in your custody, relating to this particular case—and I am talking about the Holzman investigation.

A The complete investigation?

Q Yes, the complete investigation.

A I couldn't honestly answer you, sir. I don't know.

Q Well, do you keep any kind of a record of the total number of reels pertinent to a particular investigation?

A Only by the court order number and the amount [460] of reel, or I should say, the reel number on the last box. As a usual procedure, the last box is marked "last reel," and by the number on there you would know how many.

Q Well, having examined Exhibits 1 to 10, marked for Identification, could you tell by looking at any of those boxes how many reels might have been used in the entire investigation?

A No, sir. I couldn't without going through to see if one of them was marked "last reel" as I just explained.

Q Well, you mean to say, Detective, that when someone, a detective, another detective would bring a reel to you to be kept in custody by you, you wouldn't assign a number or something to that reel to indicate it was the number-something reel of a particular investigation?

MR. DOOLITTLE: Objection.

THE COURT: Sustained.

Q There is no way then that you could tell now from your records how many reels were used in this particular investigation?

A I would have to go through all the records and tapes and pick up the last reel numbers.

Q Would that be very difficult to do, Detective?

[461] A. Not overly, no, sir.

Q Could you estimate now an approximate number?

A No, sir, I couldn't.

Q Do you know of your own knowledge whether all the reels that were employed in this particular investigation were all monitored?

A Yes, sir, I believe they were.

Q That would be standard procedure, that every reel get monitored?

A Yes, sir.

Q Regardless of how innocuous its contents may appear?

A Every reel is monitored.

Q How many men would you say were assigned to this particular case, who had access to these reels through your office?

A That's difficult without my looking at the initial boxes as to the men that I had monitor them. I assume you mean men that monitored also, not just actively engaged in the case.

Q Well, who may have come to you and requested the reel for certain purposes.

A As an estimate, I would say four or five. I'm not [462] completely sure on that.

Q Can you tell from looking at the particular cartons involved how many times a particular reel was requested for monitoring or replaying?

A No, sir. I don't keep a record of that.

Q Is a record kept when a reel is out and who has it, so that the name may be crossed off when the reel is returned, or something like that?

A No, sir, they have to go through me to get the reels and they are generally back to me the same day. I do remember who I gave them to.

Q You keep it all in your head, who has them and when they come back?

A Yes, sir, to the best of my ability.

Q Did you monitor any of the reels that we are talking about, yourself?

A No, sir, I don't believe I did.

Q Now, when you received the notations from the detective with regard to names and footage, etc., do you do anything with that other than turning it over to the Assistant District Attorney assigned?

A Not as a rule, no, sir. I read it and just turn it over to the District Attorney assigned.

[463] Q I believe you testified, Detective Tozzi—I don't think you testified to this—I withdraw that.

Can you tell by examination of the reels involved whether they were all new tapes?

A Whether they were all new tapes?

Q Yes.

A Not right at this present time, no—well, yes, yes, I could say whether they were all new tapes.

Q Have you examined them?

A I looked at them up here just now. I didn't examine them for that, no, sir.

Q How do you determine whether they are now new or whether they were used and retaped?

A A used tape has a superimposed label on the front of the box. In other words, when you reuse a tape it is magnetically erased and a label is put over the original label.

Q Can you tell by physical examination of the tape itself?

A Of the tape itself? No, sir, I couldn't.

Q In other words, you can look at those tapes and not know whether they had been used or not; you would depend on the label that you'd find on the carton?

[464] A On these—when we take a new tape out, this tape is sealed, the carton is sealed, and there is a piece of cellulose tape on the end of each reel which has to be broken.

Q Yes. So you are relying on the appearance of the carton?

A No, that's not on the carton, sir. That's on the reel itself.

Q On the reel. You can't tell, of course, the recording machine, by looking at the tape, the make, the model, the serial number or any particular recording machine from examination of the reel, can you?

A Not from the reel, from the box. On some boxes—I don't know if these are marked, but on many boxes we do put the machine on the box, an M number for the machine that was used for the recording.

Q Now, the machines, from what you stated previously, the machines would be obtained from your office?

A Yes, sir.

Q Now, do you know how many recording machines were requisitioned from your office in the furtherance of this particular investigation?

[465] A No, not right at the present —

MR. DOOLITTLE: Your Honor, I think that is wholly immaterial.

THE COURT: No, I will allow it. I will allow it.

Q I think you said you couldn't recall?

A I couldn't, no, sir. I couldn't tell you offhand just how many were used.

Q Well, could you estimate the number of tapping setups, tapping equipment?

A I couldn't estimate them. I could know by checking my records, yes, but I would not estimate them.

Q You don't have any such records with you now?

A No, sir, I do not.

Q Do you have any different makes and models or are they all pretty much the same?

A I used two different models.

Q What are they?

A Echo tape and Norelco.

Q And do you know which ones were used in this particular—

A No, I do not know unless they are marked on the box, sir.

[466] Q Can you tell me by examination of the particular tapes involved whether any splices were made, any erasures were made?

A You can definitely tell a splice, yes, sir.

Q You can definitely tell a splice?

A I can tell a splice, yes.

Q Could you definitely tell a splice if the splice was made on the tape and then it was replayed on another tape? Could you tell the splice then?

A That would be very difficult for me, I'm afraid.

* * * *

[471] (A recess was taken.)

(After recess.) [Not in the presence of the Jury]

MR. DOOLITTLE: I will start with People's Exhibit 1. I have given the Court and Br. Bouse a copy of the transcript 1-A, which is the transcript of People's Exhibit 1.

THE COURT: Now, we will follow the exhibits in numerical order.

MR. DOOLITTLE: Right, sir.

THE COURT: And the transcript will be distributed to them as each tape is played.

MR. DOOLITTLE: Right.

THE COURT: All right, let's commence.

* * * *

[477] THE COURT: Before we play that, I forgot to put in the minutes those present in the courtroom and I would like the record to indicate that the Court has taken maximum security measures in that all the doors are locked and there is no question of anyone being able to hear these conversations except the personnel I authorized to be here.

We will note the appearances: Mr. Bouse counsel for [478] Mr. Kaiser; Mr. Warren Doolittle; Detective Costello and—

MR. DOOLITTLE: Thomas Kaiser, the defendant, and Bernard—

MR. SPINDEL: Bernard Spindel, S-p-i-n-d-e-l.

THE COURT: Yes, and Mr. Smith, the court officer; Mr. Gaynor, the court clerk; Frank Dopman and George Mitthauer, court officers.

All right, go ahead.

* * * *

[486] MR. DOOLITTLE: I'll give Mr. Bouse and the Court People's Exhibit 10A for Identification. This is a tape on Patrissy's Restaurant. This is pursuant to the wire tap order.

THE COURT: Do we have an order for this?

MR. DOOLITTLE: This is meter reading 202 to 223, approximately. 10A is the transcript of that particular portion.

THE COURT: Do we have the time on any of these, date-wise?

MR. DOOLITTLE: We only have the date the thing was put on and off. Don't forget, this was an unattended machine, your Honor.

THE COURT: What's the date?

MR. DOOLITTLE: It was taken 7/6/64 and taken off 7/7/64.

THE COURT: All right, let's play it.

MR. DOOLITTLE: We don't know the exact time of [487] any of these calls.

(People's Exhibit 10 for Identification was thereupon played.)

THE COURT: Now what do you have?

MR. DOOLITTLE: The last one.

For the record, this is the wire tap on the Headliner Club.

THE COURT: This is P.E. 11, right?

MR. DOOLITTLE: This is People's Exhibit 9 for Identification.

THE COURT: What was the last one?

MR. BOUSE: 10 was the last one. You took it out of order. It was 8, 10 and now we have 9.

MR. DOOLITTLE: 9A and 9B.

Now, this is the tap on the Headliner Club, and this is a telephone conversation between Dino Conte and Thomas Kaiser.

I'm also going to present to the Court and Mr. Bouse People's Exhibit 9A which is a transcript of People's Exhibit 9, specifically meter reading 137 to 306, and People's Exhibit 9B which is a transcript of meter reading on People's 9 for Identification, approximately 480 and approxi-
[488] mately 818. As in all cases the meter readings are approximate. I put A on top of B, your Honor, so it would make it easier for you. These are long conversations.

Incidentally, for the Court's edification, on A voice number 1 on that will be identified during the trial as that of Thomas Kaiser; voice number two will be that of Dino Conte.

THE COURT: You understand you have to have voice identification?

MR. DOOLITTLE: Yes, but in the absence of the jury, and I'm advising the Court that the People will prove relative to this tape—

THE COURT: I'm saying I have to have voice identification before I can accept it.

MR. DOOLITTLE: Oh, there is no question about it, your Honor. This will not be played until voice identification is in. No question about it.

MR. BOUSE: I think your Honor's point was that before you can consider their admissibility you must have the voice identification.

THE COURT: He understands that. There is no question about it.

MR. BOUSE: Well, then, in no event can your Honor [489] decide the admissibility of the exhibits today.

THE COURT: Well, we'll see what happens. Let's finish these and then we'll take up the question of law.

All right, everybody ready?

MR. DOOLITTLE: Right.

THE COURT: Let's go.

Who is voice two?

MR. DOOLITTLE: Dino Conte.

(People's Exhibit 9 for Identification was thereupon played.)

(The following occurred during the playing of People's Exhibit 9 for Identification:)

THE COURT: All right, hold that a minute.

You say voice two is who?

MR. DOOLITTLE: Conte.

THE COURT: Who is voice one?

MR. DOOLITTLE: Voice one is Kaiser on both of these. He is the one making the call. Voice two is Conte. These will be identified as Dino Conte.

THE COURT: All right, I just want to understand.

(People's Exhibit 9 for Identification was continued.)

* * * *

[490] (People's Exhibit 9 for Identification was completed.)

THE COURT: Now, what is your next step, Mr. Doolittle?

MR. DOOLITTLE: My next step? Nothing at this point. I have witnesses to put on, then I'm going to intro- [491] duce these through Irving Holzman who can identify all the voices, having talked to all of these people previously and he will be able to identify these voices.

MR. BOUSE: Would your Honor at this time entertain any objections?

THE COURT: Oh, yes, sure, I'll listen to what you have to say. But, I'll discuss that other aspect with you, Mr. Doolittle, the identification of the voices.

Mr. DOOLITTLE: Well, may I say this, may I proceed, your Honor?

THE COURT: It has to be done now.

MR. DOOLITTLE: It doesn't have to be done now.

THE COURT: Yes, it does.

MR. DOOLITTLE: Your Honor, let me tell you what my order of proof is going to be. I'm going to produce witnesses who are going to testify to facts which are going to be subject to connection to these particular taps and conversations that were on the tap. That's the only way you can do this.

Then I'm going to put Mr. Holzman on. Mr. Holzman has been in my office. He's familiar with each and every one of these taps having heard them on more than one occasion. He's familiar with the transcript. I'm going [492] to show him the transcript. I'm going to ask him if in my presence he has read these transcripts together with the playing of the tape, can he identify the voices on these, can he identify voice number one, two, voice number A, voice number C.

Now, once he gives an identification of voice number 1, voice number 2, at that point I'm going to offer it into evidence.

THE COURT: Offer what into evidence?

MR. DOOLITTLE: The transcript and the tape.

THE COURT: I'm not going to allow it.

MR. DOOLITTLE: Your Honor, I have laid the foundation.

THE COURT: I'll let you do it this way, if you want to: You are going to have to produce Holzman to identify those voices now?

MR. DOOLITTLE: At this point?

THE COURT: At this point.

MR. DOOLITTLE: Your Honor, I could put Detective Costello on. He's heard all of these voices and he can identify these voices.

THE COURT: Well, do you have any foundation that he knows the voices from before?

MR. DOOLITTLE: Your Honor, at this point, for [493] this preliminary hearing, the purpose of this preliminary hearing was to let Mr. Bouse hear these tapes, to find out if there is anything that was wholly immaterial or irrelevant.

THE COURT: It's not only that. There are one of ten items that has to be laid as a foundation.

MR. DOOLITTLE: Maybe the Court better give me the law you are talking about.

THE COURT: I'll give you the law and let you read the case here.

MR. DOOLITTLE: All right.

THE COURT: First of all, you have to prove that the recording device before I let it in is capable of taking the conversation being offered into evidence.

MR. DOOLITTLE: This I have done.

THE COURT: That the recording is authentic. You have done that. That there were no changes, additions or deletions have been made.

MR. DOOLITTLE: That I have done.

THE COURT: That the recording has been preserved in a manner to be shown to me. You have done that; that the speakers were identified. You haven't done that.

MR. DOOLITTLE: This I will do through Irving [494] Holzman.

THE COURT: No, you have to do that before I let these conversations in.

MR. DOOLITTLE: Your Honor, I'm not going to offer them until Holzman identifies the voices. That's the point.

THE COURT: I know that, but how is he going to identify them?

MR. DOOLITTLE: On the witness stand under oath, the only way that he can do it. In other words, for this particular hearing I'm not going to put a witness who is not under oath and put him under oath just for the purpose of identifying—

THE COURT: Well, I would swear him.

MR. DOOLITTLE: But, your Honor, I'm saying as a Court Officer and with complete good faith and familiarity with my case that Mr. Holzman is going to identify each and every voice, and he's going to—

THE COURT: Prior to?

MR. DOOLITTLE: Prior to the actual playing of the tape.

Now, as I say, mechanically, let's assume that Mr. Holzman is on the stand now, I have gone into certain [495] testimony, and his testimony—

THE COURT: Of course, if you proceed with the actual voice and they are identified—

MR. DOOLITTLE: This is what I'm going to do.

THE COURT: Well, I'm not going to permit any tape playing without any identification of these voices.

MR. DOOLITTLE: Your Honor, I would't even attempt to do that.

THE COURT: Now the second point. We are past that. As long as your order of proof will—well, you'd better read this case before you come to Court tomorrow. This is an Oklahoma Case, but read it, Bashan versus State of Oklahoma by the Court of Criminal Appeals that was decided on May 27th, 1959.

MR. DOOLITTLE: What is the citation, your Honor, on that?

THE COURT: Well, I haven't got the citation here. I just went over it. I think you can run it down through the reports.

MR. DOOLITTLE: Let me see if I have that again, B-a-s-h-a-n against the State of Oklahoma?

THE COURT: Maybe I can get it for you in the morning or maybe after we finish.

[496] Now, the other point—I'm just thinking so you know my thoughts.

MR. DOOLITTLE: Right, right. I want to know your thinking.

THE COURT: It may have been allowed before. I'm not deciding what any other Judge does.

MR. DOOLITTLE: Right.

THE COURT: But when the recording is as all of it isn't as clear, undistorted that I could hear it clear, I don't see any reason for the transcript because I will tell you this: I want you to read that case.

MR. DOOLITTLE: Which one, Bashan against the State of Oklahoma?

THE COURT: And if you get any other cases—and I refer you now to—it's a case in Underhill on Criminal Evidence, in the supplement, paragraph 121—

MR. DOOLITTLE: Wait a minute. Paragraph 121?

THE COURT: Under recordings.

MR. DOOLITTLE: What volume is that?

THE COURT: Volume 1, page 72, paragraph 121.

MR. DOOLITTLE: Your Honor, before—well, may I interject this: I'll admit that these recordings are exceptional for their clarity; however, there are certain por-
[497] tions of these tapes, your Honor—

THE COURT: I'll read you the Bashan decision.

MR. DOOLITTLE: Which I myself have had to run through three or four times to ascertain whether or not what Mr. White had on there was correct. I can play them for you, Judge, and you can get up to that machine and listen to it with earphones five times and you might get it.

THE COURT: Well, in this Bashan Case the decision was that the Court erred in permitting the jury to be provided with the copies of the defendant's tape recorded conversation which was played to the jury and introduced into evidence. It says the recording—of course, I'm not giving it to you verbatim—it states the recording was understandable, and in that case there is no necessity to provide the jury with the typewritten copy.

You see, the fact is if this was not as audible, as distinct as I think it is, I don't want to overemphasize the question of the evidence by giving them a transcript.

MR. DOOLITTLE: Your Honor, I don't think the transcripts are for the purpose of over-emphasizing the
[498] the importance of the evidence. The purpose of the transcript very plainly has been as a guide to the jury.

THE COURT: Only when—I agree with you and I have done this so many times, and you know I have many trials with recordings where there is a question as to what was said or the audibility. Well, here you have a perfect—

MR. BOUSE: You can have the stenographer read it back at any time.

MR. DOOLITTLE: May I ask the Court one thing without trying to be facetious?

THE COURT: Yes.

MR. DOOLITTLE: You tell me, your Honor, I can't put the tapes on until I can have the voice identification? If I do not have transcripts, how could I possibly have

voice identification unless we are turning the tape on and off continuously? This is Mr. Kaiser.

THE COURT: That's why I said I had hoped that you would follow the procedure.

MR. DOOLITTLE: That's exactly what I have done.

THE COURT: To have the identification by the various people which would have been very simple and we would never have gotten into any other aspect.

[499] MR. DOOLITTLE: Your Honor, we haven't gotten into any other aspect. I'm at a complete loss.

May I follow my reasoning up to this point? I have laid my foundation subject to voice identification. This is the only link that is missing at this point.

THE COURT: The foundation is there with the exception of the voice identification.

MR. BOUSE: Does that mean your Honor has decided on materiality?

THE COURT: I haven't come to that yet.

MR. BOUSE: That's part of the foundation.

THE COURT: Well, you make the point. I'm just talking about procedure now, Mr. Bouse. I'll listen to you.

MR. DOOLITTLE: Now, this is what I intended to do: Mr. Holzman is the complainant, he is the victim here, complainant to the extent that he is the victim. He's going to be the People's named witness. There is no question about that, your Honor. He's going to get on the stand, he's going to testify as to certain events that preceded the making of even the first telephone conversation. At that point when we say "Get to the first telephone conversa-[500] tion," I'm frankly going to ask him to look at the transcript and ask him whether or not he heard the tape of this particular transcript in my office, reading this particular transcript. At that point, "Did you identify voices?". "Yes." "Do you know who voice one is?" In this case I think it's Holzman's voice. "Do you know who voice number two is?" "Burns." "Have you talked to Mr. Burns on the telephone before?" "Yes." "Do you recognize his voice? Do you recognize this particular conversation?" "Yes."

At this point, your Honor, I think I have laid the foundation as to voice identification. Then I'm going to offer in not only the tape, but also the transcript.

Now, without the transcript—and I think this is the whole purpose of the transcript, in aid of the jury as a guide to the jury, where voices reoccur if it is only testified to once as to who voice number 1 is, they will know; otherwise, I'm going to have to interrupt after each statement and the witness is going to have to say, "Well, I happen to know that the next voice that is going to speak was Mr. Burns," because the Court has ruled that I can't get it in until it's been identified. So the only practical [501] way you can do it in front of the jury is with transcripts.

I don't know how you ever could get in a taped conversation without transcripts.

I would say this, your Honor; I think this is probably about the fifth case that I have had with tapped conversation, and I frankly would know of no other way to do it other than to stop the machine and say, "Mr. Witness, do you know who is going to talk next? Have you talked to that person on the telephone?"

THE COURT: Your point being that the tone quality of the voice could not be identified by its tone quality alone?

MR. DOOLITTLE: That's right.

THE COURT: In other words, we have just finished this transcript. What you are saying is that unless you look at the one or the two you wouldn't identify—

MR. DOOLITTLE: That's right, there would be no way to proceed with identification.

Mr. White, for example, in his testimony, he didn't know one voice from another. He didn't know whether it was Conte speaking or Holzman speaking or Kaiser.

THE COURT: Per se.

MR DOOLITTLE: Right.

[502] THE COURT: But he would have distinguished the voice being repeated over and over again in a telephone conversation.

MR. DOOLITTLE: Right.

And he, in this transcript, which is merely a guide for the jury for identification purposes and also for such portions of which might come over so quick as to be inaudible as a guide to them—

THE COURT: Well, now, the point is—your only point on the transcript is that identification of the voices is important to you and could be accomplished even though the recording is being played, is that it's essential that the jury have the transcript for the identification of the voices?

MR. DOOLITTLE: Absolutely.

THE COURT: That's your main point?

MR. DOOLITTLE: Right.

THE COURT: What is your argument to the question that giving them the transcript would over-emphasize the importance of the recording itself?

MR. DOOLITTLE: I don't think it does, your Honor. I mean my argument—this is a matter of opinion, the Court has made the statement, I disagree with this state-
[503] ment. I mean this to me is like saying that the picture—

THE COURT: No, I gave you a case that I read to you. I paraphrased it.

MR. DOOLITTLE: Well, I disagree with the Oklahoma Courts if that is the statement.

THE COURT: Well, do you have any decisional law in New York?

MR. DOOLITTLE: No. The only thing I have is experience in doing this, and the problem has not arisen before. I say this, and I will go along with the Court, that the quality of these tapes is unusually good.

THE COURT: No question in my mind. If there is any question that this jury could not listen to that recording and they couldn't make it out, then I will say you had great validity to your argument.

MR. DOOLITTLE: I'll tell you one thing, Judge. For instance, on the last two tapes that I played, if you did not have a transcript in some of those places with that background music, you would have to hear that tape three or four times before that would make any sense.
[504] Now, we have Mr. McGrath here, who is a reporter, and he'll tell you that during these things, you

have to go over them and over them and over them and over them many, many times no matter how audible it is before you get the correct transcription.

THE COURT: All right, now, I'm past that point. You will have to give me a copy of 1 because I'm going to have to pass upon the materiality of a lot of this.

MR. DOOLITTLE: The Court may retain all of the copies of that.

THE COURT: No, I haven't got one, the first one. Now, I'll hear you, Mr. Bouse.

MR. BOUSE: Yes. With regard to—

THE COURT: You heard the argument?

MR. BOUSE: The transcription—

THE COURT: I wanted to get the thinking of the People. I'm not necessarily giving you my opinion. I just wanted to probe Mr. Doolittle's mind to see what his basis was for his offer.

MR. BOUSE: I'm aware, your Honor, of a New York Case that forbids the issuing of a transcript to the jury where the recordings are audible. Obviously, it takes away from the jury the right to interpret the manner, [505] the tone, whatever surrounding circumstances may exist on the tape recording. It then becomes something like secondary evidence where you have best evidence coming in as the recording. But, I'm not as concerned about that particular aspect as I am about the materiality and the probative effect of any of the tape recordings that we have heard.

We have the defendants, Thomas R. Kaiser, who doesn't come into play until tapes 9A and 9B, which, incidentally, were taken out of chronological context. We have Irving Holzman on tape number 10 after the two conversations of Kaiser saying, "I talked it over with my wife and we don't want any partners." That's on tape number 10, which was played prior to 9.

MR. DOOLITTLE: Tape number 10 was Rocky Graziano.

MR. BOUSE: Not 10, the last tape of Holzman.

THE COURT: You say that the conversation that Kaiser had with—I think it's Dino—you say that those two recordings are not material?

MR. BOUSE: Oh, absolutely not, if your Honor please.

THE COURT: Why?

MR. BOUSE: First of all, none of the tapes indicate a conspiracy. We have gone now, I think six days of [506] trial and we haven't come up with anything that looks like a conspiracy. On the other hand, we have Granello saying in tape after tape, "I'm alone. Don't deal with anybody else." He's saying that.

There is a tape where Dino Conte—

THE COURT: Well, Mr. Bouse, I'm not saying per se. I didn't say that per se that the recordings were the conversation of the defendant and Dino spell out a conspiracy. I didn't say that. But, what I said to you, there is no question in your mind as to the admissibility and materiality, is there?

MR. BOUSE: Oh, yes, completely.

THE COURT: On what point?

MR. BOUSE: Because there is no indication on all of the tapes that they are referring to anything with regard to the counts in this indictment, to wit, we got the count of extortion, coercion, two counts of assault and a burglary.

Now there is nothing in any of the tapes referring to those particular things that were supposed to have been entertained as part of a conspiracy upon Irving Holzman. Absolutely nothing. And you have to do an awful lot of gymnastics to get even that close.

[507] THE COURT: I want the record to reveal that I'm giving counsel an opportunity to voice his complete objection to the offer which will eventually be made by the People so that the record could have a complete explanation of his position, because during the trial obviously I would not allow counsel to expound on the law or give me his theory but only to make an objection, and that's why I'm allowing you to do this. But, the admonition to you, if I allow them in, when and if, then if you take an objection that's all you are going to do and nothing else.

Now, I interrupted you. I want you to, for my edification, devote yourself primarily to—I think you have covered—unless you want to say something else, those

two recordings that deal with the recording of Kaiser's voice. You have covered those.

MR. BOUSE: What I prefer to do, if it please your Honor, is to prepare the motion which will ultimately make it shorter tomorrow.

THE COURT: But I want to give you an opportunity to put it on the record so that when and if you take an objection, when and if anything is introduced, that the jury will not hear anything but your objection. But, you [508] are to be protected in this record if there should ever be an Appellate review that you had an opportunity to put on the record everything you want to say. All right.

MR. BOUSE: Yes, I appreciate that.

THE COURT: Anything else you want to add now?

MR. BOUSE: No, but I will reserve any objections to a more formalized review tomorrow morning.

THE COURT: Do you understand what I'm saying?

MR. DOOLITTLE: Yes, your Honor.

THE COURT: That goes for you too.

MR. DOOLITTLE: Yes, your Honor.

THE COURT: During the course of the trial you object, but I don't want any objection or any long dissertation, whether it be on the law or what you think the law is, to be made in front of the jury.

MR. DOOLITTLE: Your Honor, just as a courtesy to Mr. Bouse, I can clear up a factual misapprehension. I recall the testimony. The last one I played was People's Exhibit 9, and he had transcript 9A and 9B. The testimony has been that these conversations were on a tape that was placed sometime between July 3rd—

MR. BOUSE: No, I have that straightened out. I [509] used the wrong number.

MR. DOOLITTLE: The one before that where Irving Holzman hung up was the day before.

MR. BOUSE: Yes, I understand that.

THE COURT: Where is that material, that testimony that involved the bar?

MR. DOOLITTLE: That will be material through the testimony of this witness.

You know, your Honor, let me put it this way: Let's assume that I'm trying to shake you down. Let me give you a for instance. And you and I have a vis-a-vis conversations, therefore I might call you up and you might say, "I won't do it." And I say, "Okay for you," and I slam down the phone. That's all the telephone conversation they say. That telephone conversation out of the context of what you would testify as to what preceded it may not make any sense at all, but together with the testimony of the witness—now, Mr. Holzman is, as I say, going to testify to fill in, there were other things other than telephone conversations. That's my point.

MR. BOUSE: My point, Judge, is that vis-a-vis we don't make a raid by four Puerto Ricans all slamming down the phone. That we don't do.

[510] MR. DOOLITTLE: Mr. Holzman is quite clear as to what happened to his wife on that, and so I think was Sally Burns.

THE COURT: Well, let me say this—

MR. DOOLITTLE: But this will all come out in the testimony, not only from Holzman, but from the other witnesses.

MR. BOUSE: What I'm trying to guard against, your Honor, is these tapes coming in to buttress testimony that has not yet been adduced, and they are coming in under the guise of admission before we prove the actual conspiracy and before we have, in fact, proved the overt acts allegedly in furtherance of the conspiracy, the assault and the burglary.

THE COURT: So far they haven't come in, and you don't know what other testimony is coming yet. But, you see, this type of a case is, of course, a little difficult.

MR. BOUSE: But, it would seem to me—

THE COURT: I think of course the admonitions that I would give to the jury that if in the event there are any declarations by any of the alleged co-conspirators which are in furtherance of the conspiracy and which [511] in the event that a prima facie conspiracy has not been proven, my admonition to the jury of course would be that they are not binding on the other co-conspirators, only when and if they make a factual determination later

on that a conspiracy exists. But I will give that admonition, but if I find in my mind that before the reception of the tapes or the reception of any declarations that there has been a prima facie conspiracy proven, then of course they are admissible. In other words, the procedural step general rule is that you would not allow in declarations of co-conspirators before prima facie a conspiracy had been proven on the very sound ground that maybe an admonition to the jury could not wipe out what they heard. But the nature of the piece being what it is, I'll try to restrict the proof to give to this defendant the maximum protection I can and still have some orderly procedure in the presentation of this evidence.

MR. BOUSE: It would seem to me, your Honor, that that problem would be avoided as far as you are concerned if the proof went chronologically along with proving the burglary, proving the assaults, proving the conspiracy in furtherance of them and then linking up of [512] the defendant with them.

MR. DOOLITTLE: You know, I'm so delighted that he said that. That's exactly what I'm going to do.

MR. BOUSE: Well, after six days it's nice to know what's going to happen.

THE COURT: Let me ask you: You said you had a New York Case.

MR. BOUSE: I'm aware of it. I don't have it now. Closer than Oklahoma.

THE COURT: Well, if you give me that case—my research hasn't reviewed it, but if you have it—

MR. BOUSE: I'll phone it in, as a matter of fact.

THE COURT: You have the case, a New York Case? What level Court? An Appellate Court?

MR. BOUSE: Other than the fact that it's a New York Case.

THE COURT: I would be very happy if you'd give me any other case, any other jurisdiction other than the one I dug up myself. All right.

MR. BOUSE: I'm not as concerned about the transcript as I am about the ultimate admission into evidence of completely innocuous and immaterial items.

THE COURT: Well, you make your objections to it.

[512 A] Tomorrow prepare whatever you think is a proper legal objection so that the record is protected as far as you are concerned.

All right, case adjourned to 10 o'clock tomorrow morning. Bail bond continued.

MR. BOUSE: Thank you.

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(The trial thereupon adjourned to Wednesday, June 15th, 1966 at 10 a.m.)

* * * *

[514] THE COURT: For the record, what we have concluded at the present time in the absence of the jury, the Court had an opportunity to hear all the recordings and also, in addition, to review and examine the transcripts which were marked where we had, say, People's Exhibit 1 we would have transcript 1-a and so on in all the offered recordings.

The Court has found that the transcript as marked for identification clearly reflects the recording and the Court has found in the absence, of course, of the jury that the recordings were actually clear, identifiable in tone and substance.

Now, I have offered to you, Mr. Bouse, an opportunity to address yourself to any of the offered exhibits marked for identification so that you could spread on the record at this time any objection and let everything be put on the record. That doesn't necessarily mean that you at the time the offer is actually made when we continue the trial in the presence of the jury, that you still can't make your objection. I want you to. However, I want to af-[515] ford you an opportunity to bring to the attention of the Court any particular motion you wish to make to any particular offered exhibit that is marked for identification at this time. And you, of course, can renew your objection at the time it is offered.

Now, what do you want to do at this time? Do I make myself clear to you?

MR. BOUSE: Yes, you do, your Honor.

THE COURT: All right.

MR. BOUSE: Your Honor, at this time the defendant opposes the admission into evidence of all of the ten exhibits that were marked for identification but will address himself to the—

THE COURT: Well, now, when you say that, we had 1, 2, 3, 4, 5, 6, 7, 8, 10 and 9. Now, you say you object to all these exhibits. Now, what specifically do you object to?

MR. BOUSE: Well, I will have to break them up into three groupings, your Honor. I won't go through each one.

THE COURT: Well, no. Let me have the legal ground. Then you can go into it specifically if you want.

[516] MR. BOUSE: Well, with reference to Exhibits No. 1, 2, 3-b, 4, 5, 6, 7 and 8—

THE COURT: Wait. 1—

MR. BOUSE: 1 to 3-b—

MR. DOOLITTLE: The transcript.

MR. BOUSE: That was the second half of 3.

Well, let me put it this way: All of those exhibits that dealt with conversations between Holzman and Granello —and I think that woud be 1, 2, 3, 3-b, 4, 5, 6, 7 and 8— now the defendant objects to the admission of those in evidence against his as being irrelevant and immaterial in that they do not tend to show a conspiracy with anyone.

Now, I am not discussing whether they show an attempted extortion by Granello or an attempted coercion by Granello. I'm not discussing that. I'm saying they don't tend to show a conspiracy wherein anyone else is working with Granello. And we have on those tapes, specifically on tape—on Exhibit No. 6 that was marked for identification we have Granello saying, "There is nobody else in this picture," or "in the picture." And on Exhibit No. [517] 7 which was marked for identification he says, "I account to nobody."

Now, there is never a mention of the defendant's name in any of the conversations that Granello was having with Holzman.

THE COURT: Wait just a minute.

Everyone is excluded from the courtroom in view of the fact that none of what you are referring to now is in

evidence and everybody is requested to leave this courtroom.

(The courtroom was cleared of all spectators.)

THE COURT: All right. Now lock the door.

All right, go ahead, Mr. Bouse.

MR. BOUSE: Now, as I said, there is never a mention of the defendant's name by Granello to Holzman or even alluding to him vaguely or in any other way.

Now, I think the rule is well settled, your Honor, that once a prima facie case of conspiracy is made out, evidence of the acts and the declarations of each conspirator in furtherance of the common enterprise is against all of them. But, it says once a prima facie case of conspiracy [518] is made out—I refer your Honor to People versus Becker, 215 N.Y. 126. These are all fundamental cases —People versus Donnelly, 253 N.Y. 330 and People versus Lucciano, 277 N.Y.—

THE COURT: How about People versus Donnelly? Did you read that?

MR. BOUSE: People what?

THE COURT: Donnelly.

MR. BOUSE: No, I don't think I did.

THE COURT: Now read it. I will give you the citation later.

Well, on the basis of that, the reception of proof, on that basis I deny it.

What else?

MR. BOUSE: Well, I just want to make a point that if we don't have a prima facie case of a conspiracy we don't have any acts or decarations admissible against anybody except the guy who is doing it, and they are admissible against him personally, Granello, if you want to conclude there were any acts that he did that were unlawful.

[519] Now, the declarations being made by one conspirator and being admissible against all of them, they must be in furtherance.

THE COURT: No question about that.

MR. BOUSE: Now, we don't have any declarations made by the defendant Kaiser in furtherance of anything —or Conte for that matter.

I would like also People versus Ryan, 263 N.Y. 298.

THE COURT: What is the name of that case?

MR. BOUSE: People versus Ryan, 263, N.Y. 298.

THE COURT: What do you say that case says?

MR. BOUSE: Well, that case says any of the declarations or acts committed by one that would be admissible against the others, they must be not only in furtherance of the common enterpirse but before its termination.

Now, the tapes that were introduced with Kaiser and Conte on them are well after the termination of any conspiracy.

THE COURT: Yes. But, you see, you are forgetting one thing. Assume that you say that that conversation is at the termination, ratification, acquiescence between two [520] co-conspirators, even if something has terminated, it is still admissible against each other.

MR. BOUSE: No. If your Honor please, acquiescence—

THE COURT: No, acquiescence or placidity in itself only goes to criminal intent most of the time, but the conversation between Harris and Kaiser could obviously be accepted against each other.

MR. BOUSE: At best, it shows knowledge.

THE COURT: Knowledge and ratification. If you want me to give you the section of that—I think you may find it in Underhill, Volume 1 on criminal evidence. I don't have it here but I can refer you to it so you can be guided a little bit.

MR. BOUSE: There is no evidence revealed in any of these tapes that Granello in fact ever knew Kaiser. Don't forget that he's supposed to be conspiring with him. There is no evidence that they ever knew each other.

THE COURT: Well, your whole argument, Mr. Bouse, as I take it—and I want it to be on the record so of course it shows clearly—is that you don't think that they are material. I overrule that objection, of course with the [521] right that you have to make any general—any specific objection to any part of the tape. Of course, you have that all the time.

MR. BOUSE: I have another ground, your Honor, in that they are not probative of any issue in the indictment.

They don't tend to show the commission of anything. As a matter of fact, Dino on tape 9-b says "he doesn't know that I know you." He is talking about Granello. So here you have it on tapes being admitted. That was on tape 9-b where Dino says to Kaiser "He doesn't know that I know you."

Now, he was supposed to have a conspiracy with Granello and Kaiser and Conte, an dat this late date, July 2nd, one of the co-conspirators allegedly is telling the other one that the third one doesn't know he knows him.

Now, I submit, your Honor, that to admit these tapes into evidence is going to allow the jury to play with things that they shouldn't be allowed to play with because there is no probative effect, there is no materiality as far as the defendant Kaiser is concerned.

I don't argue that they be material against Granello. I [522] don't see how they would be material against Conte. But to show a conspiracy, inasmuch as the theory of the prosecution is that the defendant didn't physically commit any of the acts after the conspiracy, we have to confine ourselves to the conspiracy.

THE COURT: No, Mr. Bouse, I think that listening to the recording as we did-you are talking now about 9-a—

MR. BOUSE: 9-b.

THE COURT: 9-a?

MR. BOUSE: 9-b.

THE COURT: 9-b. I would say that the fair interpretation of that is in its fullest content, in totality. No, it is admissible.

MR. BOUSE: Well—

THE COURT: Of course, now I am ruling on that objection for the record.

Now, is there anything else?

MR. BOUSE: Well, let me say this, your Honor, if I can draw this analogy. If your Honor at the end is going to charge the jury that in any way the evidence—if they find portions of it that are susceptible to two interpreta- [523] tions they are bound to adopt the interpretation that is consistent with innocence.

Now, in your ruling on their admissibility, if you find that you are going to have to charge them that with the subsequent possibility of their ignoring your charge—which is always possible when you have twelve laymen—with that subsequent possibility, it would seem that judicially it would be better not to admit them against the defendant and then you don't have the risk of their not following your charge with regard to two interpretations.

THE COURT: No. My charge, of course, is not going to embody what you say but I will cover the law of conspiracy very clearly. In fact, I will reconcile and take the facts with the principles of laws involved.

No, I overrule your objection.

Now, is there anything else?

MR. BOUSE: Yes. I would like to address myself to the remainder of the exhibits so the record will be clear.

THE COURT: Yes, that's why you are here; to give [524] you an opportunity to do that.

MR. BOUSE: Now, the tape 3-a—No. 3, that was a phone call from Conte to Holzman. Now, there is no materiality, no probativeness or anything. He is asking Holzman to call Granello. Again, here is Kaiser suckered into a situation he knows nothing about with no prior testimony or evidence that he ever could or had anything to do with it. Even if you take his tapes word for word, at best he is a bystander observing a situation that is so vague you couldn't tie it up with whatever Granello was doing together with remarks that were made by Dino. Wel, he goes on his own, he does what he wants to do.

THE COURT: Yes. I have gotten this book—well, now, it was here. If you were to look, Mr. Bouse, I just quoted Underhill to you and I think—I just said to you that I agree that the statements of a conspirator made after a conspiracy had ceased to exist, well, either by success or failure, which is merely narrative of past events, ordinarily is not received against a fellow conspirator. I [525] told you I agree with that part of the principle unless the latter was present and when they were played and heard and heard them and expressly or by implication acquiesced in them. So I refer you to page 799 on Underhill, if you will read paragraph 493.

[526] MR. BOUSE: Well, I don't know, I don't disagree with that, just as your Honor says it. As a matter of fact I don't disagree but in the substance of the tapes themselves you don't have any acquiescence of anything.

THE COURT: Well, that is a matter of interpretation. That is where we differ, where we part.

MR. BOUSE: But you do have solid basis that Dino says that 'Granello doesn't know that I know you."

THE COURT: Your record is clear. You are protected on the record.

MR. BOUSE: Now, may I go to the other tapes?

THE COURT: One by one.

Now as to People's Exhibit 3 for Identification, that was a telephone conversation as I recall it by Harris to Holzman wherein he tells him to call Granello. Well, what do you say is the materiality of that, Mr. Doolittle?

MR. DOOLITTLE: Well, just one of the links in the chain. One of the links of an active part of the conspiracy. In other words, that, coupled with Holzman's testimony, together with Conte's own statements in a conver-[527] sation between him and Kaiser, coupled together with the testimony of other witnesses who identify Conte as being with Granello during portions of this conspiracy, this is highly material.

In other words, I think the jury will very fairly be able to interpret to some extent that this fellow Harris or Conte was part of the conspiracy, sort of a messenger boy and sort of an empoyee of Granello, when all the facts are in, and, accordingly, this testimony is highly material.

THE COURT: All right. On the record I will overrule your objection. What else?

MR. BOUSE: The sum and substance of the tapes with regard to the two of Conte and Kaiser, No. 1, they can't be in furtherance of a conspiracy because they are subsequent to whatever conspiracy might have consisted.

THE COURT: You are talking about the conversation between Conte and who?

MR. BOUSE: Kaiser. No admission because no prima facie case so far that there was a conspiracy, only that Granello might have been trying to extort or coerce [528] money from Holzman.

THE COURT: Overruled, but your objection is there. Anything else, Mr. Bouse?

MR. BOUSE: Now, No. 10, that is just—probably just as far into left field than the others. That is a conversation between Graziano and Granello. Is that supposedly including Kaiser?

THE COURT: What is the materiality of that, Mr. Doolittle.

MR. DOOLITTLE: Well, your Honor, this conversation between Graziano and Granello was made during the course of the conspiracy. Therefore it becomes a statement of one of the co-conspirators.

THE COURT: Who?

MR. DOOLITTLE: Granello.

[529] THE COURT: As to what?

MR. DOOLITTLE: As to what is going to happen to Joey in this case. It is Joey Albino who we will establish was a partner of Irving Holzman and the purpose was going to be—we are going to produce Rocky Graziano as to the conversation that he overheard after this particular telephone call.

Now, I told you I may not even use that telephone call. I may use it only for the purpose of impeaching a witness who may be reluctant to testify to the fact that he did, in fact, meet Graziano. I think it is material.

THE COURT: Decision is reserved on that. It is not being offered as to No. 10, but we heard it anyway.

MR. DOOLITTLE: Right.

THE COURT: The decision is reserved as to No. 10. Mr. Bouse. I am reserving decision on that.

MR. BOUSE: May I say this, your Honor, with regard to all of them, the entire set: to follow Mr. Doolittle's argument, you could have his laundryman, Granello's laundryman call him up and tell him his shirts are starched and Mr. Doolittle will argue those were the [530] shirts or one of them he was going to wear when he met Holzman that night.

I can understand when you have a complete chain, but this a is meaningless chain, and when you have to have links they have to be meaningful. These chains are going in circles. They are all meaningless. You come out where you start, nowhere.

THE COURT: At least you have your position on the record. It doesn't mean that I agree with you but at least you have it on the record.

MR. DOOLITTLE: May I say this, because this may come up pretty soon: I anticipate calling Graziano before I call Hozman, and I may at that time offer this conversation. I draw the Court's attention—I think you have a copy there-on page 2 of People's Exhibit 10-a for Identification where a voice who will be identified as Graziano says "Well, if I'm not there Dino will be there." And it will be established that is Dino Conte or Harris. "I want you to reach—I want you to try and get—try and reach out for Joey. I want to see Joey. Tell Joey he had better come in because it's important."

This conversation may be highly material because it [531] was made during the course of the conspiracy, in furtherance of the conspiracy by one of the co-conspirators, Granello. So, therefore, it may be very material for me to play this and I may offer this before I offer any of the others.

I want to state on the record my reasons.

THE COURT: All right, let's go on. We will continue. I have given you an opportunity Mr. Bouse.

Now, is there any other objection you want to make? Your objections to the tapes are overruled with the right for you to make any specific objections to any particular tape.

MR. BOUSE: Well, we have made them specifically to these tapes as a grouping in that they go nowhere and have no probative force.

THE COURT: Any particular part of any tape? You make any objection to strike any part? Your general objection, of course, is noted and of course I have denied those.

* * * *

[533] RUTH HOLZMAN, 155 Sycamore Drive, Roslyn, New York, called as a witness in behalf of the People, first being duly sworn, testified as follows:

* * * *

DIRECT EXAMINATION

* * * *

BY MR. DOOLITTLE

* * * *

[540] Q Now, let me ask you this, Mrs. Holzman: I ask you to look at the defendant Kaiser. He was not one of the men that you saw there, is that correct?

A No, sir, he was not.

Q I show you People's Exhibit 13 for Identification and People's Exhibit 14 in evidence, and I ask you whether or not you recognize either one of those men as being the persons who were in and around your particular home on this morning that you have described to us.

A No, sir.

Q Have you ever seen those men since that time?

A No.

* * * *

[991] IRVING HOLZMAN, 155 Sycamore Drive, Roslyn, New York, called as a witness in behalf of the People, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Mr. Holzman, you are married to Ruth Holzman? Is that correct?

A Yes, sir.

Q Your daughter is Mrs. Dolores Billing; is that correct?

A Yes, sir.

* * * *

[995] Q Now, let me ask you this, Mr. Holzman: Have you ever been convicted of a crime, sir?

MR. BOUSE: Objection, if your Honor please. This is—

THE COURT: Overruled.

MR. BOUSE: I respectfully except.

A Yes, sir.

Q Will you tell me when you were convicted of a crime and what crime you were convicted of?

MR. BOUSE: I'll object again, no pertinance, no relevancy.

THE COURT: Overruled.

MR. BOUSE: Well, he's impeaching the credibility of his own witness.

THE COURT: Overruled.

MR. BOUSE: I respectfully except.

A I think it was in 1943. I don't remember the month. What else did you ask me?

Q What crime were you convicted of?

A Grand larceny.

Q Can you tell me what if anything you did, sir,
[996] I mean what was the crime itself?

MR. BOUSE: Objection.

THE COURT: I am going to sustain it as to that portion of it, Mr. Doolittle.

Q Were you sentenced on that particular crime?

MR. BOUSE: Objection.

THE COURT: Sustained.

Q Well, let me ask you this: Did you plead guilty to that crime or were you found guilty?

MR. BOUSE: Objection.

THE COURT: Sustained.

Next question.

Q This was back in 1943, is that correct?

A Yes.

Q Other than that, have you ever been convicted of any crime whatsoever?

MR. BOUSE: Objection.

THE COURT: No, overruled.

A No, sir.

Q All right, now, during the months of June, July, of 1964, and for sometime prior thereto, were you a friend of the District Attorney of this county?

A Yes, sir.

[997] MR. BOUSE: Objection, immaterial, irrelevant and incompetent.

THE COURT: Overruled.

MR. BOUSE: I respectfully except.

Q Did you ever tell the District Attorney, in June or July of 1964, that you had been convicted of a crime?

MR. BOUSE: Objection, leading and incompetent, irrelevant.

THE COURT: Sustained, sustained.

* * * *

[1079] [Not in the Presence of the Jury]

THE COURT: That is true. Yes. I have now in front of me all that I want as far as the foundation. Let the record show that I will afford you a voir dire which will be limited strictly to voice identification on these exhibits.

MR. BOUSE: I will not be able to examine as to the numbers of conversations?

THE COURT: You can ask that one question as I said you could.

MR. DOOLITTLE: We will go on to People's Exhibit 2 and 2-a for Identification.

THE COURT: I am just wondering which would be the most expeditious way of doing this—

MR. DOOLITTLE: I cannot see any other way because these conversations are going to come in one right after the other.

THE COURT: All right, let us do it this way.

MR. DOOLITTLE: Then we won't have to shuttle the jury in and out and they will be inconvenienced.

THE COURT: Let the record reflect the Court has taken into its estimation a foundation to all the offered exhibits 1 through 10 for Identification, that the only part [1080] of the foundation that I am taking now-in addition to the identification of the voices that was taken before the jury I am now taking in the absence of the jury the voice identification of all the tapes which will be the balance of the foundation that I want prior to my ruling on the admissibility of all exhibits—that is 1 through 10 inclusive, for Identification.

MR. BOUSE: For the record, your Honor, these conversations concern Mayfair 1-1290 and no other phone?

MR. DOOLITTLE: No. The next conversation that I intend to introduce is the conversation of Mayfair 1-8987.

MR. BOUSE: The one we are talking about is Mayfair 1-1290.

MR. DOOLITTLE: That was the last one.

THE COURT: All right. In view of the fact I am taking a foundation and in view of the fact that I have not even ruled on the admissibility of these tapes, the courtroom will be cleared except for the lawyers. Everyone outside except defense counsel, the defendant, Mr. Doolittle, Detective Costello, and that is it.

[1081] Let the record reflect the reason the Court is excluding everyone is that the Court is now taking a foundation for the tapes prior to admitting them, and obviously I haven't ruled on the admittance of the tapes and therefore I am not going to allow anyone else to hear what is in the tapes until I rule on it.

A VOICE: Is this going to be part of the trial record?

THE COURT: Yes, it is. And for the record, I am excluding everyone from the courtroom while the exhibits 1 through 10 for Identification are played in relation to the recordings that were made because the Court wishes to have a voice identification of the voices made. And, since I haven't ruled on the admissibility of the tapes obviously I am not going to let anyone else listen to it. This will preserve for the defendant a trial and it will not expose to any possible publication by any news media matters which have not been allowed in evidence. Gentlemen, you are all excused.

(The courtroom was thereupon cleared of all spectators.)

[1082] MR. DOOLITTLE: For the record, your Honor, I am going to use Mr. Holzman to identify the voices of Dino Conte and Kaiser on the other records.

THE COURT: Yes, you do it all, the voice identification of all your exhibits for identification.

MR. DOOLITTLE: Right.

* * * *

[1097] MR. DOOLITTLE: Now I am going to play the tap that was on the Headline Bar, the conversations between Kaiser and Conte.

THE COURT: All right.

Q Mr. Holzman, prior to July of 1964, had you talked to both Mr. Conte and this defendant, Thomas Kaiser, on the telephone?

A Yes, sir.

Q And could you identify their voices if you heard them?

A Yes, I can.

Q In my office, did I play for you People's Exhibit 9 for Identification, specifically, footage approximately 137 to 306, which is evidenced by People's 9-A for Identification, and during the time I played it did I show you People's Exhibit 9-A for Identification?

A Yes, you did.

Q And did you identify the voices of Thomas Kaiser and Dino Conte on this particular transcription?

A Yes, I did.

[1098] Q Can you tell me whose voice No. 1 is?

A Thomas Kaiser.

Q And who is voice No. 2 on this transcript?

A Dino Conte.

MR. BOUSE: I will object to the foundation thus far, if your Honor please, in regard to Conte and Kaiser. The original question asked by Mr. Doolittle was with regard as to whether the witness had ever spoken to Kaiser and Conte on the phone before.

There was no showing by Mr. Doolittle that he knew that was Conte and Kaiser that he spoke to on the phone before that, that they had any personal conversations and he could recognize by the previous conversations.

THE COURT: Did you subsequently ascertain or have a conversation with Conte and Kaiser?

THE WITNESS: I spoke to Conte when he called my home and told me Sally Burns was waiting for my call and I spoke to Kaiser several times.

THE COURT: Subsequent to that?

THE WITNESS: You mean before this?

MR. DOOLITTLE: Prior.

[1099] THE COURT: Subsequent. I am talking about subsequent to this conversation.

THE WITNESS: I don't understand your question, Judge.

THE COURT: After you say you heard Kaiser speak to you on the recording—

THE WITNESS: He didn't speak to me.

THE COURT: Never spoke to you on the recording?

THE WITNESS: Not on the recording.

BY MR. DOOLITTLE:

Q Did he ever speak to you on any prior occasion?

A Oh, yes.

Q When?

A While we were servicing his equipment in his bar and he has come to my office several times with Robert Luttman.

Q Was that prior to the date of this?

A Yes.

THE COURT: What was the date on that?

MR. DOOLITTLE: That was approximately, your Honor, the 4th of July weekend I think, July 4 weekend of '64.

THE COURT: And you recognized his voice when [1100] you heard it spoken on the recording?

THE WITNESS: Yes, sir.

THE COURT: Your objection is overruled.

MR. BOUSE: I respectfully except.

[A portion of People's Exhibit 9 for Identification was played.]

Q Who said, "Hello" and "what's happening"?

A The voice who said 'Hello" was Conte and "What's happening" was Conte's voice.

Q Did you hear the voice that said, "What's the good word"?

A Yes.

Q Can you identify that voice?

A Thomas Kaiser.

Q You have heard, incidentally, the entire tape, is that correct?

A Yes, sir.

Q "What's the good word," that was spoken by the voice designated on People's Exhibit 9-A as voice No. 1?

A Yes, sir.

Q And, "What's happening," that is designated on People's Exhibit 9-A as voice No. 2?

A Yes, sir.

[1101] THE COURT: Play a little more of it.

[A further portion of People's Exhibit 9 for Identification was played.]

Q The voice that says, "Well, he ranted and raved today," whose voice was that?

A Thomas Kaiser.

Q The voice that said, "He told me—uh, he didn't tell me. He told—uh, Dave come over and, uh, he told us he told the family he was talking to Sally on the phone and he slammed up the phone on him."

Could you identify whose voice that was?

A Thomas Kaiser.

Q That is designated as voice No. 1 on this transcript?

A Yes.

Q The voice that said, "Sally slammed the phone on him"; can you identify that voice?

A Dino Conte.

Q Is that designated as voice No. 2 on this?

A Yes.

THE COURT: All right, the next exhibit.

Q There is a subsequent conversation on this reel, People's Exhibit 9 for Identification, which is designated [1102] by transcript number People's Exhibit 9-B for Identification, and this is footage 480 to approximately 818.

I ask you, Mr. Holzman, if you heard that particular footage with this particular transcript, People's Exhibit 9-B for Identification, in my office on previous occasions.

A Yes, sir, I have.

[1103] Q And hearing this, can you identify who is designated there as voice No. 1?

A Thomas Kaiser.

Q And can you identify who is designated as voice No. 2?

A Dino Conte.

Q I am going to ask you to listen to a portion of this, sir, and see if you can identify these voices.

[People's Exhibit 9 for Identification played.]

Q Who said, "Hello"?
A Dino Conte.
Q Is that designated as voice 2 on this transcript?
A Yes, sir.

[People's Exhibit 9 played.]

Q Did you hear the voice that said, "Oh, it's jammed over here"?
A Yes, sir.
Q Can you identify that voice?
A Tom Kaiser.
Q Is that identified as voice No. 2 on this transcript?
A Yes, sir.

[1104] MR. DOOLITTLE: Do you want to go a little further on this one, your Honor?

THE COURT: No, next exhibit.

* * * *

[1234] [Within the Presence of the Jury]

MR. DOOLITTLE: Your Honor, I would like to have 14 duplicate copies of People's Exhibit 9-A for Identification marked People's Exhibits 9-A1 through 9-A14 inclusive, for identification.

(14 transcripts referred to received and marked People's Exhibits 9-A1 through 9-A14, inclusive, for Identification.)

MR. DOOLITTLE: Your Honor, I would like to have 14 duplicate copies of People's Exhibit 9-B for Identification marked People's Exhibits 9-B1 through 9-B14, inclusive, for identification.

(14 transcripts referred to received and marked People's Exhibits 9-B1 through 9-B14, inclusive for Identification.)

* * * *

[1380] Q Mr. Holzman, I show you People's Exhibit 9-a for Identification and I ask you, sir, if in my office on several occasions you listened to People's Exhibit 9 for Identification, specifically 137 meter reading to approximately 306 meter reading.

A Yes, I did.

Q And just answer this question yes or no, sir: Did you identify the voices who had that conversation reflected on People's Exhibit 9 for Identification, meter reading approximately 137 to approximately 306?

A Yes.

Q Let me ask you this: I believe you testified or you said you met Dino Conte on June 4th and thereafter you spoke to him face to face; correct?

A Yes, sir.

Q Thereafter you had a telephone conversation with him where you have identified his voice before this jury; is that correct?

[1381] A Yes, sir.

Q Did you hear the voice of Dino Conte on People's Exhibit 9, meter reading approximately 137 to 306?

THE COURT: Yes or no.

A Yes.

Q Can you identify whether or not Dino Conte's voice is designated on People's Exhibit 9-a for Identification—I will withdraw that.

Prior to July of 1964, had you ever talked to Thomas Kaiser face to face?

A Yes.

Q Had you ever talked to him over the telephone?

A Yes.

Q Will you tell me in regard to what matter.

A Well, when he owned the Imperial Cafe I spoke to him. We also had several conversations after he sold the Imperial Cafe. He was going to go out and find another place of business and asked whether I would back it. I spoke to him about that and I have seen him quite a few times in the company of Bob Luttman, and I spoke to him then.

Q Now, do you know his voice over the telephone?

[1382] A Yes, I do.

Q At the time that you heard People's Exhibit 9 for Identification, meter reading approximately 137 to approximately 306, were you able to identify Dino Conte—I'm sorry, Thomas Kaiser's voice on this particular tape?

A Yes, sir.

Q Now, at the time that you heard People's Exhibit 9 for Identification, meter reading approximately 137 to approximately 306, did you have in your hand People's Exhibit 9-a for Identification?

A Yes, I did.

Q And was People's Exhibit 9-a for Identification an accurate transcription of the conversation that you heard on People's Exhibit 9 for Identification, meter reading approximate 137 to approximate 306?

A Yes, it was.

Q And can you identify who voice No. 1 is on that transcription?

A Yes, I can.

Q Who is voice No. 1?

A Tom Kaiser.

Q And can you identify who voice No. 2 is?

[1383] A yes, I can.

Q Who is that?

A Dino Conte.

THE COURT: What Tom Kaiser are you referring to?

THE WITNESS: The defendant in this case.

Q Indicating for the record the gentleman sitting next to Mr. Bouse?

A Yes, sir.

MR. DOOLITTLE: Your Honor, at this time I offer into evidence People's Exhibit 9 for Identification, meter reading 137 approximate to 306 approximate.

I also offer into evidence People's Exhibit 9-a for Identification and People's Exhibit 9-a1 through 9-a14, inclusive, for Identification. And I ask that meter reading of People's Exhibit proposed 9 in evidence 137 approximate to 306 approximate be permitted to be played; that the transcripts be given to the jury during the playing and accordingly, your Honor, I am going to offer to Mr. Bouse a copy of this particular transcript, too, of People's Exhibit 9-a.

I ask they be marked in evidence and played.

THE COURT: The offer is being made, Mr. Bouse.

[1384] Any objection?

MR. BOUSE: Yes; incompetent, immaterial and irrelevant; no probative force. I object.

THE COURT: Overruled.
MR. BOUSE: I respectfully except.
THE COURT: Mark them.

(People's Exhibits 9, 9-a, 9-a1 through 9-a14, inclusive, for Identification now received in evidence and marked People's Exhibits 9, 9-a, 9-a1 through 9-a14.)

MR. DOOLITTLE: While this is being handled I would like to have repeated one more question as to the voice identified.
THE COURT: Yes.
Q Who did you say voice No. 1 is on this tape?
A Tom Kaiser.
Q And who did you say voice No. 2 was?
A Dino Conte.
Q And that is the person depicted in this picture I showed you, People's Exhibit 13?
A Yes.
MR. BOUSE: Inasmuch as there are different voices [1385] now on the tapes, I ask that the volume be turned up to a higher degree so that all the vocal intonations can be gotten.
THE COURT: Yes, we will turn it up. And in the event Mr. Bouse or the jury have any question about the audibility, let me know.
JUROR NO. 6: Could you move it back a bit? It blasts you right out of the seat.
THE COURT: Yes. It is blasting Juror No. 6 out of the jury box so we will move it back.

(People's Exhibit 9 in evidence was thereupon played.)

(The following, People's Exhibit 9-a is the transcript of People's Exhibit 9:)

[See Exhibit 9-a, as reproduced herein at page ——]

* * * *

[1404] THE COURT: Go right into the next one.
MR. DOOLITTLE: You want to go right into the next one or do you want to take a break?

THE COURT: No. I'd like to finish the two tapes.

MR. DOOLITTLE: This is a 19-page one. It will be about twenty-five minutes.

THE COURT: Let's go.

BY MR. DOOLITTLE:

Q Now, Mr. Holzman, you told us you have talked to both Mr. Kaiser and Dino Conte before and you could identify their voices; am I correct?

A Yes, sir.

Q In addition to hearing that past meter reading of People's Exhibit 9 in evidence, did you also, in my office, hear on that same reel, People's Exhibit's 9 in evidence, meter reading 480 to 818?

A Yes, sir.

Q At the same time that you heard meter reading 480 to 818 in my office did you have in your possession People's Exhibit 9-b for Identification.

A Yes, sir.

[1405] Q Was People's Exhibit 9-b for Identification an accurate transcription of meter reading approximately 480 to 818?

A Yes, sir.

Q Can you identify whose voice No. 1 is in People's Exhibit 9-b for Identification?

A Yes.

Q Whose voice was that?

A Tom Kaiser.

Q Can you identify whose voice No. 2 is on People's Exhibit 9-b for Identification?

A Yes, sir.

Q Whose voice is that?

A Dino Conte.

MR. DOOLITTLE: Your Honor, at this time I offer into evidence People's Exhibit 9-b for Identification and 9-b1 through 9-b14 inclusive for Identification, and I ask that they be handed to the jury and the jury permitted to hear them. And I'd ask as the jury has them that meter reading 480 approximately to meter reading 818 approximately of People's Exhibit No. 9 in evidence be permitted to be played.

THE COURT: All right, show them to the defense [1406] attorney.

MR. DOOLITTLE: I'm giving a copy, your Honor, of the transcript, People's 9-b, to Mr. Bouse.

THE COURT: Any objection?

MR. BOUSE: Yes, incompetent, irrelevant and immaterial; no probative force.

THE COURT: Overruled.

MR. BOUSE: I respectfully except.

THE COURT: Have them marked.

(People's Exhibits 9-b, 9-b1 through 9-b14 for Identification were received in evidence and marked People's Exhibit 9-b, 9-b1 through 9-b14.)

MR. BOUSE: Defendant requests that the second voice be made more audible. I think we all agree that the second voice you lose.

THE COURT: Let me ask the jury: Any trouble at all in the last transmission?

THE JURY: No.

MR. BOUSE: I will withdraw my statement.

THE COURT: Let the record indicate that the jury indicated to the Court that there was no problem at all in the audible reception.

[1407] Mr. Doolittle, just a minute. Come up here.

(There was a conference at the bench not within the hearing of the reporter or the jury.)

THE COURT: All right, have a seat.

Detective, I would like you to—if the manipulation—if the tonal quality of any voice goes down, try to manipulate that so it picks up. I know it is difficult.

DETECTIVE COSTELLO: That's what I'm trying to do. Unfortunately, I can't do it sometimes, your Honor.

THE COURT: Now, members of the jury, at any portion that you find that there is any part that is not audible we'll replay it. But so far you have indicated that everybody heard everything that's been recorded.

MR. DOOLITTLE: Your Honor, this is the one with the music in the background.

THE COURT: All right, we'll play it.

MR. DOOLITTLE: I might explain that at this point.
THE COURT: No, no. you don't have to explain it. Let the jury hear the recording.
[1408] MR. DOOLITTLE: Just let them realize they are going to have to strain their ears on this one.

(People's Exhibit 9 in evidence, meter reading approximately 480 to 818 approximately was thereupon played.)

(The following, People's Exhibit 9-b, is a transcript of People's Exhibit 9.) [Eee Exhibit 9-b, as reproduced herein at page .]

* * * *

[1435]

* * * *

THE COURT: All right, there is one more Let's go.
MR. DOOLITTLE: That's all there is, your Honor.
THE COURT: What?
MR. DOOLITTLE: That is it.
THE COURT: That is the end of them; right?
MR. DOOLITTLE: Right.

* * * *

[1716]

* * * *

(The jury retired from the courtroom and the following occurred in the absence of the jury):

MR. BOUSE: Your Honor, at this time the defendant moves to dismiss the indictment on the grounds that the People have failed to present a prima facia case, and I address myself firstly to the conspiracy.
[1717] The People have failed to make any showing that in fact a conspiracy existed. We have the testimony of Granello as presented through the tape recordings that on numerous occasions he made the remark that there was no one in this with him, that he was in this alone, that he accounted to nobody.
We do have other remarks that "the people I am with are animals." He has the remark in there—something about letting the animals loose, but there is no showing that he in fact was ever in a conspiracy with anyone

to further the crimes of attempted extortion and coercion which are cited as counts in the indictment.

THE COURT: Now, just a minute. You just deviated for a minute. You were talking about the count of conspiracy. Now you went into the coercion.

MR. BOUSE: I am talking about all of these counts because, of necessity, they are related. When I talk of the conspiracy I have to, of necessity, relate myself to all the counts because there is no claim that the defendant physically or actually engaged in any of the other counts.

Now, he did state in his tapes that he was paying [1718] others at times. He was going to have to pay others off. And I think the testimony from the witness Holzman this morning indicated that the thing was that he was to get $25,000 and then $12,500 from the witness Holzman in order to pay off members of the family. I think your Honor can take judicial notice that the family indicates Cosa Nostra family, and the two people he is talking about in this indictment, Conte and Kaiser, one in a Greek and the other is German. I think that should be taken notice of. But, he is talking about paying off the family.

Nowhere in the entire testimony or any of the tapes is there mentioned the name of the defendant Thomas R. Kaiser as one of the co-conspirators. And, as a matter of fact, the witness Holzman testified this morning that, number one, he never had an argument or a fight of any sort with Kaiser. Number two, never knew of his own knowledge that Kaiser knew Granello and, number three, that Kaiser never mentioned Granello to him.

Now, there is a complete dearth and a lack of evidence [1719] to show, number one, a conspiracy and that if there was one that Kaiser was ever connected with it.

Now, there is no showing ever that a conspiracy to commit the burglary and the two assault charges that are named in the indictment existed. What we have is evidence to indicate that Granello hears about the burglary coming from Greenwood Lake, communicates with Holzman and tells Hozman "If you had been with me this wouldn't have happened."

Now, there is no question about the fact that the People have put in I think a prima facie case against Granello as an individual to the attempted extortion and the coercion. I think they have done that. If you read between the lines—and you don't have to read too far between the lines into the thing—I think that is indicated in the tapes. He is smooth and he is suave and as suave as Mulberry Street gets, but I think that is indicated in the tapes that he has tried to extort and to coerce, and I think he has done this. I think he has made himself or I think he has made a situation or tried to [1720] make a situation work for himself.

The burglary occurred and it came at a prime time. He tried to use the burglary to forward his own end. No question in my mind that that was the intent of Granello throughout the entire situation, but there is absoutely no no showing on the part of the People that this was an intent among several people, particularly the defendant. This was a unilateral thing. If you listen carefully to the tapes of Dino and Conte—

THE COURT: Dino and Conte?

MR. BOUSE: I'm sorry.—Dino Conte and Kaiser, you will note that Conte says on a number of occasions "What can you do with the man?" He further says, "It was badly handled. The whole situation was badly handled."

Now, these remarks, if you want to take them at their worst, are admissions of a conspiracy that has not been proved.

THE COURT: What do you say it was? What about the conspiracy?

MR. BOUSE: These are at their worst—if you want [1721] to take the worst possible interpretation of these remarks of Conte you would say that these are admissions of a conspiracy. But, there was no showing of a conspiracy. Therefore, there is no corroboration for any admissions.

Now, these are not statements from Kaiser you will understand. Kaiser is Conte's friend. He is talking to Conte. They are gossiping about what is happening to Holzman and Granello, but absolutely there is no talking

about anything that they knew before it happened. In other words, there is no discussion.

THE COURT: Let me ask you this, Mr. Bouse. We get down to the tape, and I would like to have your thought on this, the tape between Dino Conte and the defendant. What do you say about the question of knowledge even though there is no active participation? Say there is no active participation shown by the defendant. Suppose we have knowledge and maybe an expressed or maybe an implied ratification.

MR. BOUSE: Acquiescience?

THE COURT: Or acquiescence between the defend-
[1722] ant and Granello. Isn't the defendant in your estimation, in your legal values, bound by the statements of the alleged co-conspirator Granello?

MR. BOUSE: Oh, no.

THE COURT: Why not?

MR. BOUSE: I would say this: First of all, assuming knowledge and acquiescience of what was happening, there is absolutely no evidence that the defendant ever knew Granello. We have Rocky Graziano, a friend of Granello's for forty years, who said he never saw the defendant. There is absolutely no evidence that Granello and this man ever knew each other. The only knowledge and acquiescience you can have is the defendant talking to Conte and Conte having knowledge and acquiescence of what was happening. But, the defendant is too far removed from the situation to have any acquiescence in it. He may know something is happening, and all of the tapes indicate that he knows it after it happened.

THE COURT: I get your point. Your point is that the tape embodying the conversation between Dino Conte and the defendant you say contains nothing to link this defendant with this conspiracy and, of necessity, because
[1723] there is no linkage there even though there is the allegation of aiding and abetting, if that falls everything else falls.

MR. BOUSE: I say this: Further than that that there is no showing of any overt act that was committed by anybody, any of the defendants named in this indictment, against Holzman or any member of his family.

There has been no linking up of the burglary to the defendant Granello or to anybody. No linking up of this mysterious phone call that Dolores Billing got with anybody—Granello or the defendant, and certainly not the defendant. There has been no identification of the defendant together with any overt act that has been claimed in the first count of the indictment.

THE COURT: Ye know that, and I hope you don't press strongly from a legal standpoint that there actually must be his physical presence.

MR. BOUSE: Of course not.

THE COURT: We are talking about aiding and abetting.

MR. BOUSE: An overt act in furthermore of the [1724] conspiracy.

THE COURT: Well, on the overt act it could be done by somedoby else. If he is involved in the conspiracy, obviously—

MR. BOUSE: A conversation in furtherance of the conspiracy, if your Honor please, is an overt act. But, there has been no showing that there has been any conversation in furtherance of a conspiracy. The only two exhibits I think are 9-a and 9-b that the People have offered as far as this particular case is concerned only show two conversations between Dino Conte and Thomas Kaiser referring to past things—"He ranted and raved today. He's as mad as a wet hen. He's terrified." Kaiser said that. He said, "That's no way to treat the man."

This is not only not in furtherance of a conspiracy but there is a definite criticism of the manner in which Granello is seeking to muscle in on Holzman's business.

THE COURT: All right. Anything else?

MR. BOUSE: Excuse me?

THE COURT: Any other argument?

[1725] MR. BOUSE: No, that is the sum and substance; no proof of a conspiracy exists, but that Granello acted on his own and took advantage of his situation and tried to take advantage of it and said that if Holzman had been with him the situation wouldn't have occurred, and he tried to force him—and then talks about unleashing people and all that jazz. But, absolutely no showing he

ever was in fact with anybody in attempting to extort or coerce Holzman, and there was no showing that there was any linking him with the defendant Kaiser.

Every witness—and these are prosecution witnesses—Graziano says he knows Granello for forty years but he never seen the defendant, and Holzman also says he never knew that this man knew Granello. You cannot have a conspiracy unless you can show they at least know each other.

THE COURT: Well, Mr. Doolittle, what do you say about that? I want you to concern yourself with Exhibit 9-a and 9-b.

I want to know what is contained in those exhibits in that conversation that ties this defendant in.

[1726] MR. DOOLITTLE: Absolutely an unqualified admission by this defendant to his friend Dino Conte as to what part he in fact played in this thing.

THE COURT: What part do you say? What do you say is in that exhibit that shows that?

MR. DOOLITTLE: He was the source of the information in this particular thing. He specifically says in Exhibit 9-a that if Sally Burns had done it the way he had suggested it—meaning he, Kaiser—if Burns had taken his advice it would have been over with by now, the whole thing would have worked out, but instead he goes on to criticize how Sally Burns fouled up the whole thing because he didn't take his advice.

Certainly in this conversation alone—

THE COURT: In other words, we both agree that mere knowledge by this man—

MR. DOOLITTLE: This is an admission, your Honor, by a person who is a co-conspirator.

THE COURT: No. Mere knowledge that others were involved in some criminal scheme does not necessarily permit the declaration or acts of others to be received against him. It is only when there is knowledge or [1727] active participation or expressed or implied ratification can the acts or declarations of one co-conspirator be binding on the others.

MR. DOOLITTLE: I have a direct quote.

THE COURT: Tell me where in 9-a it contains declarations that bind this man.

MR. DOOLITTLE: I will start reading them off. This was going to be part of my summation. I say if the Court will read Extibit 9-a—I can give you some excerpts.

THE COURT: Direct me to the pages that you say ties him in. I think you had better have your summation right now.

MR. DOOLITTLE: O.K.

They are talking about the fact that Holzman—

MR. BOUSE: What page?

MR. DOOLITTLE: Page 6. Prior to this they are talking about the fact that Holzman knew that it was Sally Burns—and we have the quote in the middle of the page where Kaiser is speaking—"I knew the fucking man knew this all along. This I knew right along. I told you that. There's no question about it. He knew I was telling [1728] him things that was going on."

Then talking about Sally Burns—"No, he didn't mean you."

"Sure he meant me."

"No, he didn't mean you."

"Well, who did he mean?"

"No.—he—I don't know. He didn't mean you."

"Huh?"

"He didn't mean you."

"He didn't mean me that was telling the—"

"No."

"—information?"

"No."

"Well, who did he mean?"

"Well, he doesn't, he didn't mean that information there."

THE COURT: What do you say that does?

MR. DOOLITTLE: I say that is an absolute admission that this man was part of the conspiracy and that he was conveying personal information on to Holzman.

Now, at the bottom of page 7: "I told you this from the beginning that it was—I told you what, what should [1729] have been fucking done in the beginning. If it would have been handled the way I told you in the fucking

beginning, it would have been done and it would have been over with now."

This is Kaiser talking.

"Well, it's—forget about it."

And, you know, it is significantly enough that throughout 9-a Kaiser says to forget about it—I mean Conte says forget about it and Kaiser won't forget about it. He keeps saying after that, where Conte says forget about it, "First he wanted $5,000. Then he wanted $25,000. Then he wanted twelve-five. He was fucking ranting and raving. He was fucking ranting and raving." He is criticizing Sally Burns and that refers to the previous paragraph where he said if he had done it the way he told him it would have been over with.

[1730] Now to go on, they continue on about Holzman would have to be a moron and in the middle of the page, "You know the way this man came out with things. You know, he came out with things the wrong way, Dino."

This is referring to Burns again, in context with the statement, "You know, he came out with things the wrong way, Dino. I told you that."

Anl then Conte says, "Well, listen, you can't tell him what to do," and Kaiser interrupts again and says, "Well, I mean, I told him things and he went over there and he said it word for word practically. He said it word for word. He said it word for word about Joey. He said about that fucking broad in the Copa, instead of bringing in the fucking situation with the shylock like I told him to, instead of bringing in the situation, bringing in an outside element like I told him to."

Let me stop right there, your Honor. He told Sally Burns to bring in about an outside element. Maybe Sally Burns never did tell him that Sally Burns in fact did bring in a situation about an outside element. It was [1731] Sally Burns who told Mr. Holzman that there are other people involved, that we got to buy off other people. This was his idea. He says so himself (indicating).

Now, he goes on, "And he was, you know, to straighten it out, instead of just walking in there and, uh, telling the fucking man that anybody as big as he is, nobody gets as big as he is in this business unless he's with somebody or he don't last."

Now this is an admission by him that he had the idea originally. This certainly is an admission that this jury can consider.

Let me go on and this is a classic, on page 9:

"Naw, it is a dead issue now." This is Conte again saying, "Let's bury this thing, let's forget it," but not Mr. Kaiser. He started the ball rolling, he said, "Well, what I would do is maybe wait a month." If the jury can hear that and not say that is not an admission and not say this man is a co-conspirator, this is their county but I say, certainly, beyond any reasonable doubt at this point, uncontradicted, just what I have read now and I haven't gone into 9-B where they talk about getting another victim— .

MR. BOUSE: First of all, let's take care of 9-A, [1732] may I?

THE COURT: Just a minute. Wait until he finishes.

MR. DOOLITTLE: "The fucking information I brought over there was all correct, so, uh, there was nothing handled by me badly."

Now on page 10: "I brought, I brought the man over a fucking shot for you and for him, so, I mean, there's nothing to say that, uh, that, uh, what I did was, uh, inaccurate or I did things stupid. So the man's got nobody to blame but himself, Dino, because, uh, there was nothing inaccurate that I brought to the man. The only thing is he presented it wrong."

Now, if your Honor please, if this is not in the nature of an admission, I don't know what it is, and I state unequivocally, your Honor, that Mr. Holzman never realized this man was a co-conspirator. He never in fact realized that this man probably dreamed up this idea until he heard this tape.

There was no testimony by Holzman about Kaiser other than the fact that he knew him and could recognize his voice over the phone.

THE COURT: All right, I will let you answer that, Mr. Bouse.

[1733] MR. BOUSE: Yes, your Honor. When he is talking about he was ranting and raving, he is talking

about Holzman. For one year Kaiser knows Holzman. They have seen each other regularly..

THE COURT: What page?

MR. BOUSE: I am talking about page 8. Holzman has financed Kaiser and when he says Holzman is ranting and raving, this is information he is getting from Bob Luttman and he is passing it on to Conte and he is talking to Conte about the things. He says, "You know the way this man came out with things. You know, he came out with things the wrong way, Dino. I told you that."

He's talking about "I gave you information, Dino, and you pass it on to Granello and Granello starts terrorizing the man. That's not right." That's what Kaiser is saying throughout the situation and when he's talking about bringing in an outside element, he is talking about the shylock. He said, "Instead of bringing in the fucking situation with the shylock like I told him to, instead of bringing in the situation, bringing in an outside element like I told him to," that was for money. That was his [1734] advice to Conte to get to Granello, "Get yourself a shylock and get the money and borrow it and pay exhorbitant interest. Don't try to shake down Holzman."

That's the information he is giving to him. That is not only not an admission, a negation that he ever agreed with anything else and when he says, "Let's take a shot next month," he means take a shot at the business situation. He says, "If you want to get Granello, your boss or whoever he is, in with Holzman, wait until Granello has been done with Holzman to quiet down because he has terrified the man."

He says, "Yeah, well, it wasn't handled by me badly." In other words, he did nothing to terrify the man. "I didn't do anything to conspire against him." and he says a shot for you and for him.

THE COURT: Well, all right. I am going to take a few minutes. I will read both 9-A and 9-B. That is what you are offering, Mr. Doolittle, for me?

MR. DOOLITTLE: 9-A.

THE COURT: That is the crux?

MR. DOOLITTLE: That, coupled, of course, with the [1735] entire testimony.

THE COURT: Yes, but you both agree that the case falls or rises on the conversation between Dino Conte and Tom Kaiser.

MR. DOOLITTLE: Together with all the other evidence.

MR. BOUSE: With this further fact, that if you took 9-A and 9-B at their worst interpretation, at best, for the prosecution you would have admissions of a conspiracy that was never proved in the first place and therefore you would have absolutely no corroboration of any of the admissions, if you want to construe them as admissions. They are certainly not acts in furtherance of everything because everything has happened by this time, so at best, they would be admissions of something that hasn't been proved and therefore no corroboration for their existence.

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[1736]

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THE COURT: Decision is reserved until tomorrow morning.

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[1738]

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(The following occurred in the absence of the Jury:)

THE CLERK: People versus Thomas R. Kaiser. Case continued.

THE COURT: Mr. Bouse, on the basis of the Court's examination of all the exhibits and all the testimony, your motion is denied.

MR. BOUSE: I respectfully except.

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[2471]

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MR. BOUSE: Defendant rests.

THE COURT: People rest?

MR. DOOLITTLE: The People will rest, your Honor.

THE COURT: All right.

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[2473] [The following occurred in the absence of the jury:]

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THE COURT: All right, are there any motions, Mr. Bouse?

MR. BOUSE: Yes, if your Honor pleases. The defendant, at this time, respectfully moves for a directed verdict of acquittal on the following grounds: No. 1, that the charges contained in the indictment, to wit, the two charges of assault—

THE COURT: You are asking for a directed verdict?

MR. BOUSE: Yes, of acquittal and I am referring to the entire indictment, but I am referring specifically to the charges contained in the fourth, fifth and sixth counts. Those are two charges of assault in the second degree and one charge of burglary in the third degree, I believe.

THE COURT: Now, just a minute. What were those counts?

MR. BOUSE: The fourth, fifth and sixth counts. [2474] Those are two charges of assault in the second degree and one charge of burglary, I believe, in the second degree.

Now, if your Honor please, the defendant submits that there has not been one iota or scintilla of evidence to connect those particular incidents, without arguing whether they happened or not, and the defendant for the purpose of this motion readily concedes they happened but no evidence, not one scintilla of evidence which connects Granello with those particular incidents.

No question about the fact that you can certainly glean from his conversations with Holzman that he intended to use those incidents in an effort to shake down Holzman, no question about that, but not that he caused them in those three counts, that the defendant is accused of being a co-conspirator of Granello, in promoting these three things that happened, the assaults and the burglary, there is no evidence of Grenello being connected with them, having happened, let alone any evidence to connect the fact that the defendant did anything in furtherance of those things.

[2475] In regard to the count of conspiracy and the attempted extortion, there is absolutely no evidence that the defendant ever collaborated with Granello, with the attempted extortion or conspiracy, against Holzman.

The defendant doesn't argue that what started out as a slight shake-down may well have become an attempted extortion and a coercion by Granello, but he is strenuously arguing that there is not one scintilla of evidence to indicate in any way, manner, shape or from that he was ever connected with it.

Now, the only one that could have explained those tapes and prior to his having taken the stand, the defendant readily admits there is no explanation for the contents of the two tape recordings between Conte and Kaiser, no explanation, and the only person who could have explained what he meant and intended in that conversation was the defendant, who has gotten on the stand, has been subjected to cross-examination and had explained it. Now the defendant submits that at this stage there is no question of fact to go to that jury on.

The explanation has been made for the tapes. They [2476] only consist of admissions because the prosecution readily admits that the tapes were, if anything, were not in the form of admissions, so the admissions having been explained as not being admissions, there has been no other evidence, if they were admissions, to corroborate them as admissions.

No evidence, in fact, that there was a conspiracy or, No. 2, that the defendant was connected with it; so if your Honor pleases, the defendant respectfully submits that at this stage of the trial there exists no question of fact for a jury's consideration and no evidence upon which they could go either way in assessing the guilt or a reasonable doubt as to the guilt of the defendant.

THE COURT: All right. Mr. Doolittle, as to the fourth, fifth ad sixth counts, what have you got to say?

MR. DOOLITTLE: As to the fourth, fifth and sixth counts—

THE COURT: The two assaults and the burglary; you tell me what connects.

MR. DOOLITTLE: I definitely say that Sally Burns—

[2477] THE COURT: Specifically; tell me.

MR. DOOLITTLE: These things are all tied in through Granello and, your Honor, the Court has heard these tapes. I say that Granello has admitted his part in this and this is part of the conspiracy.

He keeps telling Mr. Holzman, "Look, Irving, there is going to be worse things than this if you don't go along"; and further, says; "If you had come down on Friday I could have stopped this."

Now, this coupled with the fact of the admissions on the part of these two defendants, saying, "Sally did it all by himself, Sally did it all by himself, Holzman would have been a fool not to know that it was just Sally himself, instead of other people," these two facts, the fact that Burns continuously talks about these things in regard to the telephone calls or the telephone call to his daughter, he keeps saying, "Irving there is going to be worse things than that"—

THE COURT: What he is saying, he is not denying that there is an oblique reference, but he says, what Mr. Bouse says, he wants to know what you feel or the people [2478] feel is the direct, because I understand your argument is that Mr. Granello, when he talked about the fact that if he hadn't gone to Greenwood Lake it wouldn't have happened and that is your main point?

MR. DOOLITTLE: Right.

THE COURT: Anything else?

MR. DOOLITTLE: This coupled with, Granello's threats at the end, "You listen to me now, you'll see a fury that you never saw in your life."

This, certainly, is a part of this conspiracy where he adopts all the acts and, certainly, implicit, an absolute admission of the burglary, and the telephone calls were all part and parcel of his doing this, coupled with the fact of the statement that he makes specifically on the tapes.

THE COURT: All right. 2 o'clock, gentlemen.

MR. DOOLITTLE: It is a question of fact for the jury.

THE COURT: Decision is reserved. 2 o'clock.

[A luncheon recess was taken.]

[2479] AFTERNOON SESSION

(The following occurred in the absence of the jury:)

THE COURT: Your motion is denied in all respects.
MR. BOUSE: I respectfully except.

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[2537]

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THE COURT: All right, Mr. Doolittle.

(Mr. Doolittle summed up to the jury on behalf of the People as follows:)

[2547]

* * * *

Now you saw Mr. Kaiser up there and I complimented him, I said, "Mr. Kaiser, you are an extremely intelligent and articulate man" and I think after looking at him you saw that he handles himself very well. He knows it, a man particularly fouled up by the use of pronouns. We are going to get to that when we discuss his testimony and specifically not when I take it out of context, but when I talk about his entire conversation with Dino Conte which I say to you goes even further than being an admission, which I say to you, were this said to a police officer, would be an absolute, absolute confession as to his part and parcel in this conspiracy as to the fact that he was the [2548] idea man but you don't even have to question here, you don't have to question that it was made to a policeman, but you have a competely voluntarily made statement, made to another co-conspirator which brings this man in. This isn't what I say, this is what Kaiser says.

* * * *

[2566]

* * * *

Here he brings in the outside element again and we know it was him and him alone because his two co-conspirators, discussed it and as he put it, "You know, Holzman would have to be a fucking moron not to surmise what was going on." He gave you an explanation for that and it goes straight in conflict in the face of logic

and good sense and in a context in which that statement was made. The same conversation on July 1st, "Irving, I'm worried myself. I'll tell you the truth, I'm going to be truthful. I'm worried myself. I'm worried about you, Irving. You won't come across." Is that the only logical conclusion that can be drawn from that conversation?

He says, "But Irving, I know that. And I want to eliminate all the bullshit. And I told you, let's do it once and for all. Now I don't know why we are going through all of this. It's ridiculous. It's ridiculous. It's ridiculous. And it's only going to be a worse situation and go where the hell you want." A threat? You bet your life it is a threat and these words all are spoken by Mr. Granello and although they are spoken by Mr. Granello are the words of this co-conspirator, Thomas Kaiser, because on Exhibit [2567] 9A and 9B he confessed to that and the only thing he didn't realize that it would be broadcast to a jury of twelve of his peers.

* * * *

[2580]

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He explains this is really a suggestion that they get lawyers and go to Court. This is not a civil matter. This is a criminal matter. A quote from Mr. Kaiser talking to Mr. Conte, "don't you see the fucking game this guy plays? I told you this from the beginning. I told you what should have been fucking done in the beginning. If it would have been handled the way I told you in the fucking beginning, it would have been done and would have ben over with."

He goes to explain things and this like I say is like a signed confession that he was the idea man. "You know the way this man came out with things." And he said he was referring to Sally Burns,—"you know he came out with things the wrong way. I told you that," and he [2583] admits it. Why does he admit? Because they thought this tape would never be played to twelve people and he had no idea of course that this was being tapped.

Then he says, "As long as he don't think there was anything stupid that was done through us, that's all. That;s the only thing, you know. I don't want him to

thing that the stupid things were done through us. It wasn't. Everything was accurate" and then Conte goes on and says, "Look, if I couldn't handle it it was my fault" and he was quoting Sally Burns.

Then he tells you this, "I know some other people interested in this guy", and he tells that this was the Federal Government or something like that. Then he says, "Maybe they'll be successful if they make a right move." Was that shake-down talk? You bet your life it is, just like the deadly humor, you know, that he talked about, called it a joke and yet he said there wasn't one humorous conversation in that 9A and there wasn't anything humorous. It was tragic.

Now the same weekend conversation about a victim. You have heard it. You have heard it and you have heard it was said as a joke, in a jocular vein. It was said in a jocular vein, half truth and half funny—"Find a victim [2584] for me". He says, "now we lost Holzman so now we have to find another victim" and you know Conte is saing this in sort of—"We lost Holzman. Now we have to find another victim" and then he says and you listen to this on the tape, "Well, we'll see what else comes up." That implies that they did lose Holzman. That's the plain word meaning. That's an admission, a confession.

* * * *

[2593]

* * * *

I say to you there are six counts. I can't tell you what to return with. I say to you that the evidence shows beyond any reasonable doubt that the defendant is guilty of conspiracy and as such is guilty of the attempted extortion and as a co-conspirator is guilty of the assault, the burglary and the coercion. The acts of Granello are the acts of Kaiser. You have here a conspiracy shown through the acts of one conspirator coupled with absolute unqualified confession on People's Exhibit 9A and 9B by this defendant, Thomas Kaiser.

I ask you to listen attentively to the law. I ask you to deliberate. Don't guess. If you have any questions about any of the tapes, please come back and have them reread

and all I can say is thank you, God speed to you to a just and true verdict.

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[2596]

* * * *

(The following occurred in the absence of the jury:)

THE CLERK: People versus Thomas R. Kaiser. Case continued.

THE COURT: All right. Now, I understand you want to make a motion first.

MR. BOUSE: Yes, if it please the Court.

[2597] THE COURT: Just a minute.

Yes, Mr. Bouse?

MR. BOUSE: Yes. If it please the Court, the defendant moves for the withdrawal of a juror based upon the inflammatory and prejudicial remarks of the assistant district attorney on his summation yesterday, and with particular reference to the characterizing of the defendant as the "idea man" wherein there was no evidence that he came up with any idea that anybody took; and, secondly, with reference to the transcripts of the two conversations as confessions which, of course, is taking away from the jury their right to evaluate the wording of the transcripts.

THE COURT: You didn't object.

MR. BOUSE: I didn't want to in front of the jury nor for the withdrawal of a juror in front of the jury. That could have been very prejudicial to the defendant.

THE COURT: Well, I waited for an objection from you and you didn't make any.

MR. BOUSE: I didn't want to do it in front of the [2598] jury. As I say, a motion for a withdrawal of a juror at this stage of the trial could have a disasterous effect.

THE COURT: No. In view of the fact, number one, that no objection was taken, it was repeated twice I know—

MR. BOUSE: And taken in cumulatively with the many other prejudicial things that occurred during the trial. Your Honor will recall the examination of—

THE COURT: What do you have to say about that, Mr. Doolittle? You equated the admission with a signed confession.

MR. DOOLITTLE: Absolutely. And I think that was fair comment. I can draw a logical inference from the evidence and I maintain that the conversation has the same force and effect as an absolute confession.

Your Honor, this is my contention: I can't see where this is prejudicial. If the Judge wants to withdraw a juror you will do so over my objection. I say it is abso- [2599] lutely a fair comment. Of course, the discretion is up to the jury as to what weight they want to give that particular statement, but I say the nature of what Kaiser said in those two conversations is an absolute unqualified confession as to his part and parcel in the deal.

MR. BOUSE: I think irreparable harm has been done this defendant and this jury is going to go away from here thinking in fact a confession was made, and half of the job is done against the defendant at that point.

MR. DOOLITTLE: I know of no rule that says for the thing to be a confession it must be given to a police officer.

THE COURT: Well, you know the difference between an admission and a confession. A confession is an expressed acknowledgement of guilt where an admission is some testimony as to material fact which is to be taken into consideration with the evaluation of all other evidence. Now, you are not telling me you don't know that.

MR. DOOLITTLE: I'm saying this was the nature of an absolute confession. "If you did it the way I told you to do, if you done it this way and done it that way," this [2600] I say is a confession, an absolute confession. I say it was perfectly fair comment in view of the evidence that has been presented to this jury.

MR. BOUSE: At this point the jury—

THE COURT: I'm denying your motion, Mr. Bouse.

MR. BOUSE: At this point I don't think the jury would ask for the transcripts because they have now got a characterization of them as a confession.

THE COURT: All right, I will deny your motion.

MR. BOUSE: I respectfully except.

* * * *

[2605] THE COURT: All right, bring the jury in. Now, what do you want to say?

MR. BOUSE: I'm saying in light of your Honor's denying my motion for the withdrawal of a juror based upon the inflammatory remarks of the district attorney—

THE COURT: Well, I'm concerned with it. There is no question I'm concerned with it. And, I'll tell you very frankly, Mr. Doolittle, I'm quite upset after a month's trial, after your statement I'm quite upset about it.

MR. DOOLITTLE: Your Honor, I'm making my statement as a lawyer.

THE COURT: You are putting it on the record.

MR. DOOLITTLE: Absolutely. I'm making it in good faith to this Court. I certainly don't attempt to get a mistrial after a four weeks' trial, and I don't know of [2606] [2607] any situation where I have been accused of making an inflammatory remark.

THE COURT: I'm upset because I know that you know what an expressed acknowledgement of guilt is and equate what an expressed acknowledgement of guilt is, because you and I know that an admission taken into consideration with all of the other evidence—

MR. DOOLITTLE: Well, your Honor, very frankly that is not—I say that this thing may be taken as a confession and they may consider it as such.

THE COURT: What do you want?

MR. BOUSE: I would ask your Honor to reconsider the motion.

THE COURT: No, I'm not reconsidering it, but I'm not going to compound it. You didn't take objection.

MR. BOUSE: I couldn't.

THE COURT: And the reason I didn't say anything is because I would just highlight—

MR. BOUSE: And that's precisely one of the reasons I didn't, and I didn't certainly want to move for the withdrawal of a juror in front of the jury and I couldn't ask [2608]-[2609] for a recess in the middle if his summation. There was nothing I could do but sit there and swallow it until the jury was gone. This is as timely as I could

under the circumstances make my objection and my motion. I can't foresee what your Honor's ruling would have been. Had I been certain that your Honor would have ruled in my favor of the motion, certainly I would have made it then. But, the disastrous effect of making the motion and have your Honor deny it—

THE COURT: Well, you could have made an objection without going as far as asking for the withdrawal of a juror. The record didn't even reflect your objection.

MR. BOUSE: I couldn't do it for this reason—

THE COURT: Well, we are all cognizant of the fact that New York State doesn't make too big a distinction between the statute and the confession.

MR. BOUSE: Judge, if I made an objection at that point I would have waived my position on the motion because I would have been heard on that particular thing, and if I only care to make an objection—

THE COURT: No, I don't believe that at all. I'm not [2610] saying I don't believe it in the sense I don't believe it. You didn't object and the Court didn't want to inject itself to enlarge and to dramatize that.

MR. BOUSE: I still submit, your Honor, that this is as timely a time as I could without the presence of the jury make this particular motion on that particular statement. A confession is all we needed in this case and now we have one.

THE COURT: No, I have denied your motion.

MR. BOUSE: Well, then I would ask in—not in the alternative but based upon your denial I would ask that your Honor in some manner cover the situation in the charge.

THE COURT: You are asking me now to charge this jury?

MR. BOUSE: No, no, I'm asking you—

THE COURT: As to the distinction between confession and an admission?

MR. BOUSE: No, I'm asking you not to admonish with regard to Mr. Doolittle's remarks regarding confession yesterday—that would highlight it. But, somewhere in the charge if you can seek to undo what had been [2611] done yesterday.

THE COURT: Both counsel come up.

(There was a conference at the bench not within the hearing of the reporter.)

THE COURT: All right, bring the jury in.

(The jury entered the courtroom.)

(Roll call of jurors; all present.)

* * * *

[2612]

## THE COURT'S CHARGE

THE COURT: Mr. Foreman, madam and gentlemen of the jury: It now becomes my duty to charge you as to the law applicable in this case. Before doing so I would like to commend the attorneys for the very able manner in which each of them has carried out his function as an advocate. And, of course, to you, members of the jury, for your devotion to duty as citizens of the community.

This trial has been exacting in so far as the requirements of your attention are concerned because of the tremendous heat, because of some excitement and other things that have transpired during the trial, and therefore it becomes of utmost importance that the final words in this case are given to you in a calm, quiet atmosphere.

* * * *

[2669] The witness then testified that he listened to People's Exhibit 9 for Identification and that he identified the voices as Dino Conte and Thomas Kaiser. He identified People's Exhibit 9-a for Identification as an accurate transcription of the conversation that he heard on People's Exhibit 9 for Identification. He identified voice No. 1 as that of Thomas Kaiser and Voice No. 2 as that of Dino Conte. Copies of People's Exhibits 9-a for Identification were then distributed to the jury and People's Exhibit 9 in evidence was then played to the jury.

The witness then identified People's Exhibit 9-b for Identification as an exact transcript of another telephone [2670] conversation which was recorded on People's Exhibit 9 in evidence. He identified voice No. 1 as that

of Thomas Kaiser and voice No. 2 as that of Dino Conte. Copies of People's Exhibit 9-b were then distributed to the jury and the recording of the telephone conversation, People's Exhibit 9, was played to the jury.

You will note here, madam and gentlemen of the jury, that I have not attempted to marshal or summarize the tape recordings for you. All of the tape recordings which were played for you are in evidence and, again, if at any time you have any questions concerning these exhibits marked in evidence you may request that they be played to you again.

* * * *

[2697] Now, there was mentioned here by both counsel about direct and circumstantial evidence so I am charging you on that.

Now, members of the jury, there are two types of evidence: direct and circumstantial. In order that you may properly consider the evidence I will define both [2698] direct and circumstantial evidence to you and explain to you what the law provides with respect thereto.

Now, direct evidence consists of the testimony of witnesses who have told what they saw and heard in relation to the crimes charged—that is, they testified they saw or heard things said or done by the defendant which if taken together and believed might comprise the elements necessary to find the defendant guilty of the crime charged.

Now, circumstantial evidence is evidence given to you by way of exhibits or testimony of witnesses concerning facts and circumstances not directly showing the commission of the crime charged but from which it is contended that the commission of such crime by the defendant is necessarily to be inferred.

Now, you heard counsel give you the milkman example so I will stay with that. Assume you go to bed at night and you wake up in the morning and there is snow on the ground. You see footsteps from the curb to the door. You look next door and you can infer from the footprints that your neighbor has an early morning visitor, and if you see a milk truck at the curb you can infer from that

[2699] that it is the milkman. And, if you don't see any steps coming back out you can infer that he is still there. But, if you didn't have the milk truck you couldn't infer that it was the milkman because it could be anybody else. Do you understand that?

Now, there are certain rules which control the jury's consideration of circumstantial evidence. When you are considering the circumstantial evidence the circumstances themselves must be proven by direct evidence and must not be left to rest upon conjecture, suggestion, speculation or other inferences. The conclusion sought must flow naturally from the proven facts and must be consistent with them all. The proven facts must exclude to a moral certainty and not alone must all of the proven facts be consistent with and point to guilt but they must be inconsistent with innocence.

In other words, it is of no value if the circumstances and the facts proven from which inferences are to be drawn are consistent both with the defendant's innocence or the defendant's guilt. To be of value circumstantial [2700] evidence must be such that all of the facts and circumstances proven are consistent with and point irresistibly to the defendant's guilt and at the same time are inconsistent with his innocence.

Evidence, therefore, is not to be disregarded or disbelieved merely because it is circumstantial. Where the facts or circumstances are proven by direct testimony to your satisfaction and inferences resulting from those facts and circumstances point irresistibly to a defendant's guilt, a verdict of guilty may rest upon a surer basis than when based upon the testimony of eye witnesses whose memories may fail and whose passions or prejudices may color or influence their testimony.

Now, bear in mind, in this case, however, that the People do not rely in asking a verdict of guilty upon circumstantial evidence alone. They have adduced both kinds of evidence, namely, direct evidence by the testimony of witnesses concerning things they saw and heard directly involving the defendant and some of the other named defendants in the indictment in the commission of the crime charged and the facts and circumstances

[2701] from which they claim the inference of the defendant's guilt irresistibly flows. You are, therefore, to consider both sorts of evidence, and remember that the rules which I have given you concerning circumstantial evidence do not apply to direct evidence and that you are not called upon to rest your verdict entirely upon the evidence which is circumstantial but rather upon the direct evidence and the circumstantial evidence in this case.

* * * *

[2703] Now, you will note that as I get into the specific charges later on that I talk about intent especially when I talk about the assault count, the assault on Ruth Holzman where a specific intent is required. There are species of crimes an essential ingredient of which is a specific intent as distinguished from crimes which only require a general intent. This means that the People must prove more than the mere commission of the acts; they must prove beyond a reasonable doubt that in committing these acts the defendant was actuated by the criminal intent to do the very things condemned by law. Intent is a mental process or state of mind. You cannot see it, you cannot hear it nor can you physically feel it. Therefore, the [2704] existence or absence of specific criminal intent must be inferred from a diversity of circumstances such as presence or absence of motive, admissions made, if any, and having some relation to intent, and presence or absence of mistake, and the defendant's then state of mind as manifested by conduct and all of the other facts and circumstances attending the alleged commission of said crimes.

Intent is a secret and silent operation of the mind and its only physical manifestation is the accomplishment or the intended accomplishment of the thing decided upon. Since it is, as pointed out, a mental operation it is not always easy to establish. It depends upon the particular circumstances of the case, upon the man's spoken word, his actions, or upon a combination of both.

Upon the question of intent you may infer that a person intends that which is the natural and necessary and probable consequence of the act done by him, and unless the

act was done under circumstances to preclude the existence of such intent you have a right to find from the [2705] results produced an intention to effect it.

Now, there was some mention here in summation about confession and admissions. Now, a confession is a direct acknowledgement of guilt made by the defendant. An admission is an act or declaration by the defendant from which either alone or with other evidence his guilt may be inferred. The distinction lies in the fact that a confession is an expressed acknowledgement of guilt whereas an admission is circumstantial evidence of guilt, and that was referred to with reference to the tapes.

So you see in this case you will recall that the conversations that are alleged to have been made by the defendant and his alleged co-conspirators were received in evidence. You must first decide whether the defendant and his alleged co-conspirators made these statements or admissions attributed to them—and I repeat again an admission is a statement by the defendant as to one or more material facts which may be considered by you along with the other evidence in the case on the issue of [2706] his guilt or innocence.

If you find that the statements or admissions were made by the defendant or by his alleged co-conspirators and you find that they were made either in furtherance of a conspiracy or after the conspiracy has been proven, they are binding upon this defendant. But, if you find that they were not made by the defendant or by his alleged co-conspirators they are not binding upon this defendant and you must disregard them.

However, if you find that they were made by the defendant or his alleged co-conspirators, then determine whether they are true in whole or in part and give them such weight as you believe they deserve. You, the jury, shall determine whether or not they were made, and if made the conditions and circumstances under which they were made and the effect thereof and the probative weight and value which may range from the lowest or none at all to conclusiveness.

Under our law, again, a person may not be convicted of a crime upon his own statement or admission standing

[2707] alone. Even if you should find that the defendant admitted the crime in his statement or admission, there nevertheless must be additional proof or other evidence that the crime charged has been committed. I leave it to you, of course, to say in this case whether there is other evidence in addition to the defendant's statement that a crime has been committed.

Now, there has been some mention in this trial—and frankly in the summation—about motive and as a result I have to give you what the law is on that; what importance are you to attach to evidence of motive—that is what it comes down to.

Motive is a causal reason that moves the will and induces one to action. It often plays a part in criminal cases because it frequently points to the reason for doing a particular act. For this the presence of absence of motive becomes important particularly in determining intention or lack of intention on the part of a defendant. Motive is not an element of the crime charged and proof [2708] of motive it is not necessary to establish the defendant's guilt, but such evidence is always admissible and should be considered by you.

Motive is important where the proof is circumstantial in its nature as some of the proof in this case has been because motice can aid the jury in evaluating the weight to be given to circumstantial evidence. So you may determine whether the defendant had a motive, what the motive was, and gave it such effect as you think it is entitled to within the scope of this charge.

* * * *

[2722] Now, you will recall that on many occasions throughout this trial the Court admonished you to the effect that the acts and admissions of the defendant being tried, this defendant, and the acts of any defendants named in the indictment is to be considered only in the event the jury had determined beyond a reasonable doubt that a conspiracy existed between the defendants named in the indictment and this defendant. Once you have determined that a conspiracy existed between the defendants and this defendant, only then may you consider the [2723] acts and admissions of each of the co-conspirators

as relates to the furtherance of the common design planned by them. Such acts and admissions are then admissible against the defendant Thomas R. Kaiser as a co-conspirator. Of course, any acts or admissions committed by the defendant Thomas R. Kaiser are to be considered in the same context in determining whether a conspiracy existed and he was a co-conspirator with the other defendants named in the indictment.

In considering this rule of law you should also bear in mind that the acts or admissions of others other than the defendant named in the indictment made after the common design is accomplished or abandoned are inadmissible as against this defendant Thomas R. Kaiser; that the declarations of a co-conspirator cannot be considered for the purpose of proving or establishing a conspiracy itself.

However, the existence of the conspiracy may be proved by circumstantial as well as direct evidence.

If, after a careful review of the evidence, you find that the accused on trial, Thomas R. Kaiser, conspired to-
[2724] gether with the others named in the indictment to commit the crimes charged, then each of the conspirators is criminally responsible for the acts and declarations of his co-conspirators done to effect the common object of the conspriacy and any of the acts done by one in perseverance of the originally concerted plan are in contemplation of the law considered the acts of all.

Once again I instruct you that only when a person is a part of the conspiracy is he bound by the acts of others done to effect their common, unlawful purpose. The defendant Thomas R. Kaiser in order to find him guilty beyond a reasonable doubt of the first count of this indictment must be found by you to be a party to the conspriacy.

* * * *

[2749] THE CLERK: The two alternate jurors will please retire separate and apart from the main jury body in the charge of a sworn officer.

The regular jury will now retire separate and apart from the alternates in the charge of a sworn officer.

(The jury and the alternates, separate and apart, retire for a luncheon recess at 1:10 p.m.)

[2750] (The following occurred in the absence of the jury)

THE COURT: Now, gentlemen, on the record, I am going under the section of the Code of Criminal Procedure and I will exercise my discretion and give these jurors the exhibits when and if they call for them.

However, I will not give the transcripts; I will let them listen to the recordings if they request it.

MR. BOUSE: And not the photographs?

THE COURT: No, I will keep them out.

MR. DOOLITTLE: You know, you have a problem, Judge, because they are in evidence and if they ask to see them—.

THE COURT: I can exercise my discretion under the code.

MR. DOOLITTLE: If they request to hear the tapes they will be allowed to see the transcripts?

THE COURT: Oh, yes, just as an aid. I don't want them to take the transcripts. I want them to hear the actual recording.

* * * *

[2751] (The jury and the alternates returned to the courtroom at 4:40 and the following occurred:)

THE CLERK: May the record indicate that the two alternate jurors are in the courtroom separate and apart from the regular jury.

THE COURT: Let the record so reflect.

Now, Mr. Foreman, I have your four notes. Before I have them marked as a court exhibit, the first question—and I will take them in this order—No. 1, you request: "Does each party involved in an alleged conspiracy have to have a criminal intent?"

Now the second question: "If you have knowledge of a conspiracy and don't report it are you part of the conspiracy?"

Now, the other two notes I will hold. Will the stenographer please read to them—and you listen very care-

fully to my charge on conspiracy. Start with where I said "Members of the jury . ."

[2752] (That portion of the Court's charge as requested was thereupon read by the reporter.)

THE COURT: Now, that should answer your first question: doing some overt act.

Now, does that answer your questions on the first two, Mr. Foreman?

THE FOREMAN: Yes, sir.

THE COURT: Now you have another request, number three: "At what point does an adviser or informer become a conspirator?"

Now, this is a question of fact for you to determine. I cannot give you the answer to that. On the elements of the conspiracy, that is a question of fact for you to decide. Now, if you want me to recharge the whole count of conspiracy, I will do it.

Do you think, Mr. Foreman, you want that?

MR. FOREMAN: No.

THE COURT: Now the fourth one: "Transcripts 9-a and 9-b." You request them. You cannot have them but you can listen to the recordings. Would you like to listen to the recordings of 9-a and 9-b? We will play them [2753] for you right now. Do you want to listen to it?

THE FOREMAN: Yes.

THE COURT: Mark these notes as court exhibits, and would you put on the record that I have in my own handwriting put on Question No. 1 "each party to a conspiracy must be actuated by a criminal intent," and on note No. 4 I put down "can hear recording only," that these were my own notes that I put on the notes themselves.

Mark them as court exhibits.

(Four notes referred to received and marked Court Exhibits 2, 3, 4 and 5.)

THE COURT: I will allow you to look at the transcripts. They will be distributed to the jury as the recording is played.

Now, do you want to write another note there?

THE FOREMAN: Yes.

THE COURT: Write it out and we will give you a slip of paper. While we are playing this recording I will get the sections of the charge that you request in this last note.

[2754] (People's Exhibit 9 in evidence as evidenced by People's Exhibit 9-a, the transcript, was thereupon played.)

THE COURT: Now, before we have the next recording, Mr. Foreman, I have another note from you. The note says "We would like more information about guilty knowledge."

Now I will call your attention to the portions of the charge that is going to be read and just devote your attention to the phraseology.

(That portion of the Court's charge that was requested by the jury was thereupon read by the reporter.)

THE COURT: Now read what I said about intent.

(That portion of the charge as requested was thereupon read by the reporter.)

THE COURT: Now, is there any question in anybody's mind?

(No response)

Now do you wish to have 9-b of the recording and the tape?

THE FOREMAN: Yes.

THE COURT: All right. Play 9-b. Mark this last [2755] note as a court exhibit.

(Note referred to received and marked Court's Exhibit 6.)

THE COURT: Just let me add this: Like intent, the presence or absence of knowledge can only be inferred from collateral facts. You understand? All right.

Now play 9-b. They all have the transcripts.

(People's Exhibit 9 in evidence was thereupon played, that portion with respect to People's Exhibit 9-b in evidence.)

THE COURT: All right, they may retire.
THE CLERK: The two alternates will retire separate and apart in the charge of a sworn officer and the regular jury will now retire separate and apart in the charge of a sworn officer.

(The jury thereupon retired to their further deliberations at 5:40 p.m.)

(At 5:50 p.m. they went to supper and returned at 7:50 p.m. to their deliberations.)

(The jury returns to the courtroom at 10:05 p.m. and the following occurred:)

[2756] THE CLERK: Your Honor, the two alternate jurors have returned to the court separate and apart from the regular jury, and the regular jury is now entering the courtroom separate and apart from the alternates.
THE COURT: All right. Mr. Foreman, I have received your note. You wish to have reread the fourth, fifth and sixth counts of the indictment.
Mr. McGrath, will you read it, please.

(That portion of the charge requested to be read was thereupon read by the reporter.)

THE COURT: All right, Mr. Foreman?
THE FOREMAN: Yes, thank you.
THE COURT: All right, you may retire.
THE CLERK: The alternate jurors will retire separate and apart in the custody of a sworn officer and the reguar jury will now retire.
THE COURT: Please mark this note as an exhibit.

(Note referred to received and marked Court's Exhibit 7.)

(The jury retires for their further deliberations at 10:12 p.m.)

(The jury returns with their verdict at 10:22 p.m.)
[2757] (Roll call of jurors.)

THE CLERK: The jury is all present, your Honor.

THE COURT: I have this note from the jury stating they have their verdict. Will you mark it as an exhibit.

(Note referred to marked as Court's Exhibit 8.)

THE CLERK: The regular jury will rise and the defendant will rise and face the jury.

Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: Yes.

THE CLERK: Mr. Foreman, what is your verdict?

THE FOREMAN: Guilty on the first count; guilty on the second count; guilty on the third count; not guilty on the fourth, fifth and sixth counts.

THE CLERK: Harken to your verdict as the Court has recorded it: You say you find the defendant Thomas R. Kaiser guilty under the first count—that is guilty of conspiracy in violation of Section 580-a of the Penal Law; guilty under the second count—that is guilty of attempted extortion in violation of Section 850 and 851 of the Penal [2758] Law; guilty under the third count of the indictment—that is guilty of coercion in violation of Section 530 of the Penal Law, and not guilty under the fourth count of the indictment—that is the count of assault in the second degree in violation of Section 242 of the Penal Law; not guilty under the fifth count of the indictment—that is not guilty of assault in the second degree in violation of Section 242 of the Penal Law, and not guilty under the sixth count of the indictment—that is not guilty of burglary in the second degree in violation of Section 403 of the Penal Law. That is your verdict so say you all?

THE JURY: Yes.

* * * *

[S 1*]

## MINUTES OF SENTENCE

* * * *

[S 3] MR. BOUSE: That is right. I am making a motion now for arrest of judgment based upon the jurisdiction aspect wherein the Jury acquitted the defendant of the last three counts of the indictment. Now, the last three counts, which your Honor will remember, concerned the burglary and two assaults. They were in Nassau County, allegedly committed in Nassau County, and the defendant was acquitted of that. The three counts upon which the defendant was convicted are the conspiracy, the attempted extortion, and the coercion.

Now, I think your Honor will recall that there was no evidence adduced with regard to those three counts laying the jurisdiction in the County of Nassau. So that it would appear at this time that the Court does not have jurisdiction to sentence this defendant on that conviction. And [4] the defendant will also move to set aside the verdict—

THE COURT: Wait. On that motion there, on the arrest of judgment, on that ground denied.

MR. BOUSE: And the defendant respectfully excepts. And the defendant also moves to set aside the judgment and set aside the verdict that it is against the weight of the credible evidence in that the guilt of the defendant was not proved beyond a reasonable doubt.

THE COURT: All right. Denied.

MR. BOUSE: Respectfully except.

THE COURT: All right. Go ahead. Now, you may proceed, Mr. Clerk.

MR. BOUSE: I think there was one other thing, if your Honor please, for the record—

THE COURT: Wait. Have you completed your preliminary?

THE CLERK: Absolutely, your Honor. The answer is that there is no legal cause.

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* The excerpts of the sentence are placed here in their proper chronological order. In transcribing the sentence minutes, the Court Reporter paginated and bound them separately from the minutes of the trial proceedings. The sentence minutes are here designated by an "S" preceding the original page designation.

THE COURT: All right. Go ahead.

MR. BOUSE: I think in regard to the sentencing it should be noted for the record that two of the other known defendants have pleaded guilty, that one of them was sentenced to eighteen months in the County Jail [5] and the other defendant received a sentence of six months. And I make that notation for the record so that your Honor might be guided accordingly in passing sentence.

THE COURT: All right. I am not guided by that. I don't care what anyone else does in any other case. The only thing before me is this defendant who was tried before me on a certain indictment and the Jury brought back certain convictions. And I am bound by that. Of course what you say will be taken into consideration by myself. But I am bound by what the Jury's verdict was. All right. Anything else you want to tell me?

MR. BOUSE: No, your Honor. The defendant is ready for sentencing.

THE COURT: All right. Now, we have had a complete conference on this. Your lawyer has been with me and I have a complete probation report.

On the first count of which you stand convicted, conspriacy in violation of Section 580-a of the Penal Law of the State of New York, it is ordered and adjudged by this Court that for the crime of conspiracy in violation of Section 580-a of the Penal Law of which you stand convicted that you be imprisoned in Sing Sing [6] Prison at Ossining, New York, at hard labor, under an indeterminate sentence, the maximum of said imprisonment to be seven years and the minimum one and a half years.

Now, on the second count of the indictment of which you stand convicted which is attempted extortion in violation of Section 850 and 851 of the Penal Law of the State of New York, it is ordered and adjudged by this Court that for the crime of attempted extortion in violation of Section 850 and 851 of the Penal Law of the State of New York of which you stand convicted that you be imprisoned in Sing Sing Prison at Ossining, New York, at hard labor, under an indeterminate sentence, the maxi-

mum of such imprisonment to be seven years and the minimum one and a half years. This sentence to run concurrently with the sentence I imposed under the first count.

And on the third count of which you stand convicted of the crime of coercion in violation of Section 530 of the Penal Law of the State of New York of which you stand convicted, I will suspend sentence.

* * * *

Peo. 9a-4

[PEOPLE'S EXHIBIT 9A]

RB 2-27 # 8A DJW RCO-5 R1
7-3-64—7-5-64—1800-1015
approx. 137-306

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A Headline Lounge.

1 Dino, please.

A Sure.

2 Hello.

1 Yeh, captain.

2 What's happening?

1 What's the good word?

2 Nothing.

1 Huh?

2 Nothing,—

1 What happened?

2 —nothing.

1 Well, he ranted and raved today.

2 Yeh.

1 He told me—uh, he didn't tell me. He told—uh, Dave come over and, uh, he told us he told the family he was talking to Sally on the phone and he slammed up the phone on him.

2 Sally slammed the phone on him?

1 No, Holzman slammed the phone up on Sally.

2 Yeh.

1 And he threatened Joey.

2 He threatened Joey?

1 Yeh.

2 Naw, he didn't.

1 He said he threatened to do something to hurt Joey on 111th Street, and, uh, Joey's in the hospital now getting, having a hernia operation.

2 Naw, you see, uh, this is what Holzman said; that Bob went in there and that Bob told him that, "I don't want to give Sally Burns fifty per-cent of my route." And there was too much loose talk where it was going back. The whole thing was handled very bad.

1 Yeh, well, I told you that from the beginning, D.

2 Well, we're out of it. I'm, I don't want to discuss it no more. I don't want to have nothing to do with it.

Forget about it, that's all. I don't want to have nothing to do with it. Let them, uh, you know, whatever happens let it happen, 'cause I don't want to have nothing to do with it, 'cause who knows what's going to happen now. So, that's that. See what happens.

1 So he says, uh, now that, uh, you know, why should I get this fucking deal and fucking. "What's with this thing with Sally Burns. Fuck him."

2 Yeh. Well, that don't mean nothing.

1 He had different things about Joey. He says, "I'm going to tell Joey to go to the District Attorney when he comes out because he threatened him," threatened he was going to, going to hurt Joey for some reason. I don't know what the fuck he said that about Joey for.

2 Who?

1 Sally.

2 Sally didn't say that.

1 Yeh. He says, he says he threatened Joey over the phone.

2 No, he didn't. He's full of shit.

1 And he says he slammed up the phone on him.

2 Maybe he did. I don't know. Maybe he did. Maybe Sally did threaten him. I don't know. Who knows.

1 What did Joey do?

2 Huh?

1 What did Joey do?
2 I have no idea. I don't know what, uh, he's going to do. He said forget about it. It's all over, that's all. We took the shot and that's—
1 Yeh.
2 —the end of it, that's all. Forget about it. It's nothing to discuss no more. Took a shot and it didn't work out; that's all. What the hell; going to hurt people for something that didn't work out? Forget about it. That's the whole thing. That's all. Tell Bob to drop it; forget about it. I don't want to have nothing to do with it no more. It's handled bad and that's all. Took the shot and it didn't work, that's all.
1 Yeh.
2 Let him forget about it now.
1 Yeh.
2 That's all. That's the best thing now. Why get in trouble now? After didn't gain nothing out of it, so—
1 Yeh.
2 So let it go now.
1 Yeh, that's the best thing. That's what I told you that night to forget about it.
2 Yeh. Well, now it's all over—
1 'Cause I knew the fucking man was going to do that you know?
2 Yeh, well.
1 Especially being that it started the way it did, you know. It didn't pay.
2 Well, listen that's all.
1 Thank God he didn't go out there, that's all.
2 Yeh, probably.
1 'Cause he would have wound up in jail. What else is doing? How's business?
2 Well, it's all right. Not bad.
1 No problems?
2 No.

1 Yeh. Where's—Oh, uh, there's no question McGloyne's still alive. He's over here with his whole fucking gang of kids.

2 Yeh, huh?

1 Yeh, he's putting them on the fucking rides here. So I got to hide in the office here so he don't fucking capture me.

2 Hm.

1 'Cause if he saw me—And, uh, I got to, I got to keep ducking him, you know, hide so he don't fucking capture me here.

2 Yeh.

1 'Cause I didn't even say nothing to him. I kept walking. I looked at him. He looked at me and I just kept fucking walking, you know. But he's got, he's got a little hat on him. He's got, well, he's got at least four kids with him walking around there like a proud poppa.

2 Yeh. All right, that's all. See what happens. Whatever happens, happens.

1 All right, tiger.

2 Yeh. Tell Bob to drop this now. Now, let's not have, you know, not to keep on talking about it and everything.

1 Oh, no, there's nothing. I, I told him it's all over, forget about it, nothing to do. Shouldn't happen.

2 Well, he didn't fire Bob?

1 No, he didn't hear nothing today. But, uh, he wasn't in the office when, uh, when he came in he wasn't in the office; probably still out at his house.

2 Yeh.

1 So, uh, he didn't see him, you know.

2 Oh, he didn't go in today, Holzman?

1 No, he just stayed in the house.

2 Hum. Well, who knows.

1 So, uh, he didn't see him yet to—so, I don't know, you know, he didn't see him to get the good news or what.

2 Huh?

1 I don't know it's 'cause he didn't go in, you know.
2 Yeh.
1 Maybe he was afraid to go in and, I don't know, give him the good news, but he—I saw him before I came over here.
2 Well, who did he tell he slammed the phone down on Sally?
1 This morning he told, uh, Dave.
2 Uh, huh.
1 He was telling him he's not supposed to phone him like that. I slammed the fucking phone. I don't talk to a fucking animal like that.
2 Yeh, well, it's best to forget about it; that's all. It was handled very badly and that's it, that's all.
1 Yeh.
2 See, actually, you know, nobody should have known about it because there—you know, Sally feels definitely there was some way this guy knew that it was him, you know, handling the whole thing.
1 It was who?
2 That it was Sally, 'cause he told him that he knew, you know, that it was Sally.
1 That he knew it was Sally?
2 Yeh.
1 Well, he'd have to a fucking idiot to really actually not to surmise it.
2 No, he told him that he was told. He says, "I know it's you. I was told. I know where you're getting the information."
1 Well, he was—that I knew all along. I—
2 Well, this is what he told him.
1 I knew the fucking man knew this all along. This I knew right along. I told you that. There's no question about it. He knew I was telling him things that was going on.
2 No, he didn't mean you.

1 Sure he meant me.
2 No, he didn't mean you.

1 Well, who did he mean?
2 No—he—I don't know. He didn't mean you.

1 Huh?
2 He didn't mean you.

1 He didn't mean me that was telling the—
2 No.

1 —information?
2 No.

1 Well, who did he mean?
2 Well, he doesn't, he didn't mean that information there.

1 Huh?
2 He didn't mean that. I don't know who he meant, becau—but I know he didn't mean you.

1 In reference to what?
2 I don't know; something else. Aw, forget about it. The whole thing is done with now.

1 Well, you're not, you're not explaining it to me. Why don't you explain it to me what you're, what you're talking about.
2 No. He seems to have known something that, uh—Aw, it doesn't make any difference.

1 Known what? What could he have known?
2 He knew something. I don't know how he found out, but, uh—

1 First of all, the man would have to be a fucking idiot, don't you understand?
2 Yeh.

1 The man from the beginning kept roaring, "Who put this fucking man oneme? Who is this man to come in here and tell me about Harold Thompson, about this guy, about that guy? Who put this fucking man on me?" This was his ranting and raving from the beginning: "Somebody put this fucking man on me, that he's doing this—"
2 Well—

1 "—hat he's making the move," he's raring and raving. He was, he told Dave, "This fucking man tells me, 'Nobody goes as far as you do in this business unless he's with somebody.' He says, "Can you imagine this fucking bum telling me this to my face? 'Nobody can go as far in this business on your own ingenuity unless you're with somebody." He says, "He comes out and tells me this to," his face.

2 Well—

1 Don't you see the fucking game this guy plays?

2 Well—

1 I told you this from the beginning that it was—I told you what, what should have been fucking done in the beginning. If it would have been handled the way I told you in the fucking beginning, it would have been done and it would have been over with now.

2 Well, it's—for get about it.

1 First he wanted 5,000. Then he wanted, uh, 25,000. Then he wanted twelve-five. He was fucking ranting and raving. He was fucking ranting and raving.

2 Well, what are you going to do. The best thing is to forget about it now. Best thing is to forget about it. That's the whole best thing.

1 But you see you have to see that, uh, the man, that, uh, you know Holzman has to be a fucking complete fucking moron—

2 Yeh.

1 —not, not to surmise what was going on.

2 Well—

1 You know the way this man came out with things. You know he came out with things the wrong way, Dino. I told you that.

2 Well, listen, you can't tell him what to do so—

1 Well, I mean, I told him things and he went over there and he said it word for word practically. He said it word for word. He said it word for word about Joey. He said about that fucking broad in the Copa, instead of bringing in the fucking situa-

tion with the shylock like I told him to, instead of bringing in the situation, bringing in an outside element like I told him to. And he was, you know, to straighten it out, instead of just walking in there and, uh, telling the fucking man that anybody as big as he is, nobody gets as big as he is in this business unless he's with somebody or he don't last. You can't make a statement like that.

2 Well—

1 Well, don't—Wouldn't the guy have to be a fucking moron, Dino?

2 I don't know.

1 This is the same as it was with Kinto's troubles, straightening this out, straightening that. You'd have to be a fucking—like these kids on these rides out here not to know that.

2 Yeh, but, see now, it's a, it's a bad situation. Oh, well, forget about it. Look—

1 Of course it's a bad situation now. It's a—

2 Now you got to drop the whole thing.

1 Huh?

2 You got to drop the whole thing. It's the best thing, you know. Tell him to forget about it, that's all. It's all over.

1 Well, what I would do—Of course, the man, you know, uh, can do what he wants. If he feels it's dead, it's dead.

2 Naw, it's a dead issue now.

1 But what I would do is maybe wait a month—

2 Naw, naw, the ber—Don't, don't even want to, uh, he doesn't want to even go through with it; discuss it no more, you know. That's the best thing. Because, uh, it was handled so badly that it's, uh, no good no more. It's, you can't do nothing no more.

1 Yeh. Well, it wasn't handled by me badly, Dino.

2 No. Who's saying that? But, uh, but, uh, you know, he says forget about it. So the best thing is forget about it, huh.

1 The fucking information I brought over there was all correct, so, uh, there was nothing handled by me badly.

2 No.

1 You understand?

2 But he's not talking—

1 I brought, I brought the man over a fucking shot for you and for him, so, I mean, there's nothing to say that, uh, that, uh, what I did was, uh, inaccurate or I did things stupid.

2 No, not you.

1 So the man's got nobody to blame but himself, Dino, because, uh, there was nothing inaccurate that I brought to the man. The only thing is he presented it wrong and, uh—

2 Yeh, he knows that. He realizes that. He realizes it. He knows it. He knows that it's wrong. That's all. So, see what happens. Who is that, uh? Uh, well, whatever happens, happens; that's all. Best thing is to forget about it now, you know. This guy running to Cahn and everything, you know—

1 Yeh.

2 —it's no good, you know.

1 Yeh. Well, I knew all that was going to happen.

2 Yeh. Well, well, let him go to Cahn. Because there's nothing they can do 'cause Sally's forgetting about it.

1 Yeh.

2 He's got nothing to do with it no more; that's all. You know—

1 I—

2 —I thought he would, he would, you know, become ranting and raving and everything, but he's not. He says, "Forget about it. It happened, it happened."

1 Yeh.

2 That's all.

1 The only thing is, uh, tell him, uh, I don't know what transpired with Joey, but whatever the story was the way he sounded that, uh, Sally threatened Joey over

the phone. He threatened to jump him on 111th Street, something about 111th Street uptown; and, uh, I know he's got a joint up there on 111th Street. He's got a box in a joint up there. Now, I don't know what it was about, but, uh, uh, Joey just went into the hospital on, for a hernia operation. He told him that he said, he told Dave that, uh, uh, that he said, you know while Dave was there that he's going to, uh, go see Joey and tell Joey to go to the District Attorney's office; he was threatened by this guy. So I don't know. Maybe he's liable to talk fucking Joey into doing it, but, uh, I don't know what transpired between them.

2 Naw, forget about it. The whole thing is forget about it, you know. Just stay away from the whole thing.

1 I don't know what transpired between him and Sally.

2 I don't know either. Best thing is to forget about it. That's the best thing right now, you know, I mean, 'cause it was, it's all over. He says—no—he went, he went away. He says, "Look, we took a shot and—

1 Yeh.

2 —that was it, you know."

1 Where did he go up to Greenwood Lake?

2 I don't know. I don't know where he went. It's all over with.

1 Well—

2 Forget about it.

1 —as long as he don't think that there was anything, uh, stupid that, uh, was done through us, that's all.

2 Naw, he, he said to forget about it and that's it, you know.

1 That's the only thing. Uh, you know, I don't want him to think that, uh, that, uh, stupid things done through us.

2 Naw.

1 It wasn't. Everything was accurate.

2 Oh, he knows that. That he knows. Uh, it's just that, uh, he handled it bad on his own, that's all. He said

it yesterday. He said, "Look, if I couldn't handle it," he says, uh, "it was my fault," that's all. And, uh, what, whatever—He says, "Whatever's happened, happened, that's all." He says, "Maybe it's for the best. Maybe I would have got in—" He says, "Maybe I would have got in trouble with this guy," you know.

1 Yeh.

2 So, that's it, you know.

1 All right.

2 But, uh, I'll tell you this. I know that, uh, some other people interested in this guy.

1 Yeh.

2 This I'll tell you for sure. So—

1 Well, let him deal with them then.

2 Well, that's what's going to happen.

1 See what they have to say.

2 That's what'll happen. That's, that's the eventual outcome.

1 See if they do it right,—

2 So—

1 —right?

2 Yeh. Maybe they'll be more successful.

1 Maybe they'll be more successful if they make a right move.

2 Yeh, all right. 1—All right, Dino. 2-All right, I'll see you, Tom. 1—Yeh. 2—So long. 1—I'll see you next week probably. I'll come in the city. 2—All right. 1—All right, kid.

[PEOPLE'S EXHIBIT 9B]

Peo 9B-8 Evid

RB 2-27 # 8B DJW (Same as reel 8A)
480-818

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A Headliner.

1 Dino, please.

A Dino? Dino.

2 Hello.

1 What's happening, anything?

2 No, no, it's quiet.

1 Yeh.

2 What's doing?

1 Oh, it's jammed over here.

2 Yeh, huh?

1 Oh, what a fucking day. What a day.

2 Well—

1 Been like this since twelve o'clock noon.

2 Yeh, huh?

1 And it, it broke a little bit about seven to eight, you know. I guess they were eating. Now it's fucking jam packed here again.

2 Sure.

1 Sure, today and tomorrow some fucking days.

2 Well, well, that'll be—It's a hell of a thing over there what he's got there.

1 But then at the—but, uh, then, uh, you know, the kids they go, in this area they go to camp, you know they send them to camp and all that shit.

2 Yeh.

1 So, uh, uh, he says, you know, the rest of the summer is basically the, just the weekends you know. But the weekdays aren't too much 'cause a lot of kids—then a lot of the people out this way, you know, Douglastown and, uh, Bayside, they go away for vacations, you know.

2 Yeh.

1 They go to the mountains and all that fucking shit.
2 Yeh.

1 You know, two weeks here, two weeks there. That cuts it down. It's a fantastic fucking weekend here.
2 Sure.

1 But I imagine you, you're going to feel it in the city a lot of people go away.
2 Naw, it's dead; dead last night.

1 Oh, was dead last night?
2 Yeh.

1 Yeh, a lot of them go away. That Fourth of July weekend knock your brains out.
2 Plus that Goldie and the Gingerbreads opened up at the Wagon Wheel there.

1 Oh, did they?
2 Yeh.

1 Yeh. I thought they weren't going to play over there.
2 Well, that's where they are. So, that's, that. Well, see what happens.

1 Yeh. That'll really knock the jock off 'em.
2 Well, sure.

1 Who was that that answered the phone? Murray?
2 Yeh. Uh, no, Bobby Greco.

1 Oh, yeh. How's Murray?
2 He's all right; took off last night.

1 Took off?
2 Yeh.

1 What the fuck is he taking off on Friday?
2 Well, he's the boss now.

1 Oh, he could afford to do that now, huh?
2 Now he could do that. Well, you got to let him be the boss, that's all. That's the only thing.

1 That's all you got to do, "Is this all right, Murray? What do you think of this?" Then you go for the eyeballs, right?
2 Yeh, yeh, that's what you got to do with him.

1 "Is this all right, boss?" All right.
2 Yeh, that's what you got to do with him. That's the only answer.

1 I saw a thing in the paper there about that Sweet Chariot, about the, uh, the people that owned the Sweet Chariot opened up a delicatessen on 49th Street called Mr. Kiska.
2 Yeh.

1 Did you see that?
2 Yeh, that's where the Rialto was.

1 Where that is?
2 Yeh.

1 Oh, yeh?
2 Um, hum.

1 Oh, the Rialto's out altogether now, huh?
2 Yeh, so's Mattie's Towncrest.

1 Oh, the Towncrest is out?
2 Yeh.

1 Yeh?
2 Well, he got a thirty-day injunction.

1 Yeh, I thought I saw that. I passed there last week. I thought I saw it open.
2 It was open but he got a thirty-day injunction.

1 What about the Casino and that?
2 Well, that they didn't get to. Scotti went up to Hofstedder and told him that Matty was a big Mafia man and they went on Scotti's word.

1 Yeh.
2 And they cancelled the license.

1 Yeh, that's what the bitch about that fucking liquor license. No other business in the fucking world could you do that, see.
2 That's right, yeh, just on his say-so.

1 Meat markets and everything couldn't do that, but that fucking liquor license, forget about it.
2 He won, he won. He beat them in everything. He won all the battles, but he lost the war. It's the old story.

1 That's right, that's the case.
2 Well, there was nothing he could do about it. There was no—This guy was out to get him and that was it, out to—
1 They can give you a, they can give you one of a million excuses to cancel a liquor license.
2 Uh.
1 That's all they got to do is want to get on you, that's why I say this fucking business.
2 Uh, that's all he did was go up there and tell them he was a mafia man, no proof, no nothing, and that was it, and he blew the—well, blew the license. So, that's that. That is that. That's what happens to you. Nothing you can do about it.
1 Well, he don't have to worry.
2 Naw.
1 He must have a few dollars, huh?
2 Yeh, plus the, the other joints'll run you know.
1 Yeh, sure, they'll run.
2 He's starting—
1 Maybe he'll let his brother run them and get out of town.
2 No, he's going to, he's going to start buying a few more now and just keep them, you know.
1 Yeh.
2 Till things cool down he says, and then later on, "I'll, I'll won't be on the scene no more, that's all."
1 Yeh.
2 I won't be. It's only me, you know." See, they want, wanted to knock off the Towncrest because that was like a symbol there—
1 Yeh.
2 —Matty's Towncrest. And that's it, that will be it.
1 Geez, you know what's a nice-looking place, that Golden Horn.
2 Yeh.

1 It's a pretty looking place when you pass it. Is he doing any business in there?
2 Well, I don't know.
1 It's pretty to pass. They got it lit up nice, you know.
2 Yeh, yeh.
1 They got, uh, a nice attraction in the window there you know.
2 Yeh. Well, he put belly dancing there now.
1 Oh, he's got the belly dancing there, huh?
2 Yeh, yeh, yeh. Well—
1 Geez, you know, what's funny, I meet so many customers from the, uh, Town and Country Club in here.
2 Oh, yeh?
1 Yeh. Either here or next door at the driving range, you know?
2 Oh, sure.
1 So many fucking people come in, customers, you know, that must live out here, in Great Neck, or Bayside—
2 Yeh.
1 —right around the area here. Yeh, I met so many of them next door today.
2 Listen, find a victim over there, will you?
1 Yeh, yeh, I'll tell you there's a lot of fucking Cadillacs pulling out of this place.
2 Well, find one. Jesus, I'm starving over here.
1 Pulling out of this fucking driveway here.
2 Find a victim there.
1 That's for sure.
2 Sure, we got to find a victim. Now, we, we lost Holzman so now we got to find another victim. Find somebody else out there.
1 Well, we'll see what else comes up.
2 Well, I got something coming up pretty soon. See what happens. Maybe I can retire things go right in the next few weeks.

1 Well, just be careful now, that's all, be fucking careful.

2 Well, see what happens.

1 That's the only thing I want you to do.

2 Well—

1 Don't take no fucking wacko chances here.

2 Aw, there's no chance to take.

1 How's Bobby? Is Bobby still over there?

2 Yeh, but, uh, I'm not, uh, dealing with them no more. I got a new, uh, crew here.

1 Yeh.

2 Yeh. Older, more experienced in the field of operations. See, you got to form a unit just like they have in the, you know, like the special forces in the Army, you know?

That's what you got to do. You got to form a unit you know with—

1 Yeh.

2 —with, uh, with, uh, walkie talkies and everything, the whole thing.

So—I seen that picture, the Asphalt Jungle there with the great jewel robbery there. So maybe we'll come across something like that. But we'll see what happens.

Either we'll make the papers or, or we'll—next episode we'll make the papers all right. We'll make the newsreel. Gabe Pressman will be interviewing everybody in it, like he did in the last time.

1 I had a—I had a thing a guy was talking to me about. Uh, when I come over I'll tell you about it.

2 It's got to be substantial though, you know. Listen, when the guy told me about this thing that time on Park Avenue it didn't make any sense but—

1 You know I had to laugh at myself. I was in the store there, the drug store, I saw a picture of Max Factor. Geez, I wonder if he's got any money.

2 Heh. heh.

1 He's, he's pretty big in that business, too, you know.
2 Yeh.
1 When I come over I'll tell you about it, what this guy told me. The—see what, uh—
2 What's our boy, Irving, doing? Is he, is he—He's not leaving the house, huh?
1 No, he's still in the house.
2 Yeh.
1 He's fucking terrified.
2 He's not coming to New York, huh?
1 No, he won't, he probably won't for a while—
2 Well—
1 —but, uh, that'll wear off. He'll be back in action.
2 Yeh, yeh. Meanwhile, he has to stay cooped up there.
1 Yeh, they're all out there. There's the daughter, son. They're all, uh, living out there.
2 Well, listen, maybe he's better off, you know.
1 He closed the, uh, he closed the New York office down Friday, yesterday—
2 Yeh.
1 Nobody over there, but he—
2 Well, what is he going to do with the Great Neck office?
1 I don't know what he's going to do with it, going to get rid of Nick.
2 And who's Nick?
1 Nick is the guy that, uh, (Indistinguishable) kid is out there, but he really doesn't know, but he's the only one that's been going in. The kid has been going in.
2 Well, maybe, maybe he'll, he'll want to call up anyhow, Holzman. Maybe he'll want to speak to somebody, Irving. So, see what—
1 Well, you never know. He'll be left alone for a while. See what develops with him, right?
2 Yeh. Well, I know what's going to develop so—

1 The man can't, uh, the man can't, uh, stay there forever, right?

2 Yeh. Well, he can never come into New York again though.

1 He's got to come out. He's got to function. He got to make—he's got to keep the, the route functioning. If he don't, if he doesn't he loses the fucking route. If he can't make these tremendous payments on his fucking route, you know, he'll lose the route.

2 He can never walk into New York again, he knows that.

1 Well—

2 The minute Lyn Durant is out. You know he's in, he's in Chicago now.

1 Who, Lyn Durant?

2 Yeh, but somebody, the other fellow's in Chicago, Sally.

1 He went to Chicago?

2 Yeh.

1 Yeh.

2 He left this morning. Now this guy is in for a little activity. He didn't think the—But, please don't say nothing to even Bob no more.

1 No, no.

2 Because Bob said something to this guy and it came back to Sally and—

1 Said what?

2 I don't know. Sally's blowing his fucking top. Started screaming at me and everything. He says—I says, "Look," says, I told him, I says, "Tommy did the best." He says, "Yeh," he says, "but there, there was a leak from one of the other people." Either Dave or somebody must have caught a hint of something. Or Bob, you know. You never can tell.

1 I told you before, Dino, the man would of had to been a fucking moron not to know what was going on, the way it was done. Don't you understand? Now, naturally when, uh, naturally when, uh, when Holzman

mentioned to Bob that, uh, this man wanted to come in as a partner, "in my operations," you understand, he probably told him, "Well, you're not coming, he's not coming in a partner in my business."

2 Well, that's what I told him.

1 You understand? But what could he say? Dino, could he say, "Yeh, Yeh, uh, Irving, I, I think that that's a good thing." Are you kidding me? He would of fucking crucified himself.

2 Yeh.

1 He would have crucified himself, because the fucking man has got his phone tapped. He knows the information's coming from him. He knows it's Sally from the fucking beginning. The man knows it. Don't you understand? He'd have to be fucking crazy. How many weeks ago did I come to you and I told you, Sal, Sal—Irving was telling everybody Sally walked in the office Friday—Monday when that event happened—and then after that he says, "If you would of went with me Friday this would have never happened." I told you that.

2 Yeh.

1 He was telling fucking people even though Sally meant it in a way that if people knew that he was with him it wouldn't have happened.

2 Yeh.

1 But he just as much as told him, "Well, I wouldn't, this wouldn't of happened if you went with me. You would of done as I told you."

He was going around telling fucking people that. I told you that two weeks ago, three weeks ago.

2 Well, I tell you one thing: Sally is determined he don't care if he gets pinched he told me. He says, "What are they going to pinch me for?" He says, "Let them pinch me." He says, "I don't) (Continued next page.) care." He says, "Let him, let him go to the FBI and let him go to—"

1 But you fail to realize this is the situation, Dino. The man's not going to give a fucking inch; not an inch. Now—.

2 Only if he can't function, Tom.

1 Yeh, only. And what are you going to do if he can't function? He loses the route.

2 Well, but this, this is Sally wants. He wanted to ask you that. He says do you feel that if he lost the route that uh, because uh,—He's going all the way. He told me.

1 Well, that's all he's going to do. He's certainly not going to kill the guy, Dino, and uh, if he keeps this guy so terrified that he can't function, that Nick's got to function here, and this guy Red's got to function in New York then—

2 Red does not function. Red's quitting Monday. Red is quitting Monday. Red ain't functioning in New York.

1 He's quitting?

2 Yeh.

1 Yeh? What makes you say that?

2 I'm telling you, he's quitting.

1 Well, that's that's why I say that's the only thing and now this is what's going to happen and, and you, the man will lose the route, you understand, but he's not going—uh, he won't accomplish anything like this. I, uh, to me this is wrong. I would let things go.

2 Well, no, Sally has these, these four notes from Irving for $25,000 a piece that he has here, you know. I mean, they're the one's due the 1st of July, it's past due already.

The other one's due uh, uh, in August, and the other one's due in September, and the other one's due in October. One's past due already. So, uh, see what happens.

1 Four notes on what?

2 I don't know. Personal notes $25,000.

1 Four personal notes totaling $25,000?
2 Totalling $100,000.
1 Well, I don't know, I don't know anything about that.
2 This is how they came up. I don't know.
1 That was that, with that the other business you were talking about? With the, with the Graziano and the, the commercials?
2 No, no they, they did something else. You know, uh, oh, that he's a partner in. Forget about it. Nobody can ever use that.
1 Yeh, well, I don't know anything about that—
2 Yeh,
1 —but uh, this here to me is uh, to me, is going about it the wrong way, Dino.
2 Well, you can't tell him nothing, Tom. You can't even say nothing. He's going—
1 I mean to terrorize this guy is, is wrong because within two, three months if things go wrong that he can't have the operation going right, and now, uh, he'll lose the fucking route.

Then, uh, then he loses the whole route, Dino. that's not only his deal.
2 Well, you can't tell, I'm telling you the guy went to Chicago this morning. I know what he went there for. This man does never go to Chicago no more 'cause the minute he steps in Chicago he, he gets, somebody'll be waiting for him, put him right back on the plane and send him back to New York.
1 Well, I don't know if it's the right thing.
2 Well, look, whether it's the right thing, whether it isn't the right thing, uh—See, I'll tell you what Sally told him over the phone.

He says, "Listen you cocksucker—" After Irving you know said, "Well, no, my partners don't want you," and this and that.

See, he blamed it all on his partners.
1 Yeh.

2 He said, "It's not me. It's my partners. They don't want you." So Sally said, "Listen you cocksucker," he says, "I'm telling you now," he says, "you used my name a lot of times. You told people that I beat you for $2,500 with that Gallo business.
"I did it as a favor" which he did, he straightened it out as a favor.

1 Yeh.

2 —never got no money for it or anything and I didn't want anything." He says, "But you don't think you're going to use me now." So—and then Sally hung up on him.

1 Yeh, he said that he slammed the phone up on him.

2 Yeh, but it was reversed. Sally—

1 Yeh.

2 That's what's terrorizing him. He told him uh, he says, "I'll guarantee you you can't come to New York." And he meant it.

1 Yeh.

2 And this guy knows he meant it.

1 Y[redacted]

2 I'm telling you I know this man like a book. You know I've seen him do things, they've gone wrong with unions and other things and he's he's backed off and said, you know, see because he wanted me to tell you, you know well, I, see he doesn't know that I know you.
See, when you were here last night he was around, the other kid was around and Joey was around when I was talking to you over the phone, see.

1 Uh, uh.

2 So he wanted me to tell you just look, we're laying off, that's it, you know, it's none of our business no more.
We, we took a shot and what not, but I—see, I know what, how he is, you know. I know what he's going to do. That's the only thing, the only thing, you know, I don't want, I don't want to see Bob, you know, anything happen to Bob, you know in this whole business here.

1 No, nothing can happen to Bob, see, nothing can happen to Bob. The only thing that can happen to Bob is that uh, he's go actually he's got fifty percent of his, of Coin-A-Matic route, that uh, the only thing that can happen to Bob is of course he'll try to pressure him more, you know.

2 Well, if he pressures Bob—

1 Because everything that Sally does he's going to blame—If anything happens to Sally, like, say anything happens to Holzman—Now, let's just take a for instance.

Say Holzman went out was hit by a, by a drunken kid tonight, as a hit and run driver, Bob is in, Bob is in Mineola jail tomorrow morning.

B How do I get outside here?

2 Yeh.

1 He's in Mineola jail tomorrow morning. They'll pick him right up and take him out there, 'cause anything that happens to him she's going to blame Bob right away because they're blaming him now.

You don't know what they're doing to this guy. He can't get his, he can't get his machines moved, Dino. It's, it's a fucking pathetic. I feel sorry for him.

2 Yeh.

1 He can't get his fucking machines.

2 Well, maybe we're going to have to go out, uh, maybe, uh, maybe Sally'll have to become his partner, uh, you know, on the surface temporarily.

1 He can't get his fucking machines moved. You know what he's got? He sent some fucking drunk, some guy that used to do work for him before with a station wagon moving machines from bar to bar, you know, switching them in new locations, and that. The fucking National Truck won't touch him. Ronnie was saying, "Fuck him, let him, let his work pile up."

2 Where is this National Truck?

1 They're out here in the, in the back on a lot in back of the Peter Luger's thing.

2 Oh, by Peter Luger's?

1 Yeh.
2 He can't go by Peter Luger's anymore anyhow.
1 They got a—
2 How many trucks do they have?
1 Two.
2 Two.
1 But then he rents. He's he got two on with the thing but then he rents some of them Hertz things. When they, you know, when they're very busy he rents them by the day.
2 Well, we'll see what happens. All right, I, I'll let you know next week, uh, I, I, I'll tell you next week. You'll see some big results.
1 But the uh, the only thing I'd say here is that uh, uh, the man, the man won't, is not going to give an inch, I know now.
2 Yeh.
1 And if it's done wrong now you're not going to do anything but, uh, to, but to tie him up so that he'll lose the fucking—he'll lose everything.
2 So what. Let him lose it. Oh, he's going to know that. He's either going to have to know that he's going to lose it or he's got to pay this money that he owes; that's all.

*He owes all this money. I mean the guy took the* money and he took it in good faith, and they loaned it to him in good faith, no interest, no nothing.

1 He took a loan. Is that the way it's set up?
2 Yeh.
1 Well—
2 He took this money in, in good faith, as friends and now—
1 You know I got these notes here with, wh—with his signature on it. You want them? The $900 worth of Charlie Brown's notes?
2 Yeh, bring them over, too, bring them over. We'll put, put them all in together here.

1 Yeh, I got them, too.
2 Put them in, too.

1 Well, you see he could turn around and, you know, and say that he had collected the money and was giving it to me and I was giving it to Holzman. He could say, "For your fucking information that money that you were getting, you know, Tommy wasn't collecting it. I collected it and I gave it to Tommy, or Dino collected it and he gave it to Tommy—
2 Yeh.
1 —and he gave to you."
2 Yeh.
1 Now he got over about $450 of that money so far, see. See maybe something like that could give a break, you know, 'cause otherwise I'll tell you he's crucifying fucking Bob.
2 Well, that's what we got to put a stop to.
1 He's crucifying Bob. He's got everybody shunning him. Nick shuns him. The fucking mechanics out there, you know, don't tell him nothing, don't say nothing to him, and he, he's blaming the whole fucking thing.

You see, naturally with me, he accuses me, too, but I got nothing to do with him, you know, but uh, you know Bob's got to fucking live with him. And you know another thing, I had to give Bob $2,500 he tried to lift, he made loans.

See now to show what a cocksucker this gus is him and Bob made loans, uh, him and Bob made loans to juke boxes totalling $3,000. Then Holzman turn around and didn't put the money in the bank.
2 Humm.
1 You understand?
2 Yeh.
1 So—
2 Well, hello, hello. Hello. Yeh, what happened?
1 Yeh, I pressed this incom button—
2 Oh.

1 —and it went off.

1 And he didn't put the money in the bank, see, and he was going to let the notes bounce.

2 Yeh?

1 You understand? And then the both of them were going to go to court, uh, you know, when the things came up, as the you know issuing the checks with no money in the bank, and he was going to take care of his half. This is what the fucking story was. He was going to take his half as a fifty per-cent partner.

2 Well, I'll tell you.

1 So, the kid's taking an awful fucking, uh, beating, an awful beating, but like I don't want to go and, and say to Sally, criticize Sally what he did. You understand?

2 Yeh.

1 But he did do the fucking thing wrong because he said things verbatim to this man that knew they come from Bob, knew it, Dino, believe me. He knew it come right out of his mouth.

2 Well—

1 Now—

2 —maybe we shouldn't have done it that way and—

1 He knew it come right out of his mouth. That's why he's, that's why he's crucifying this fucking kid now. Now it's all he has to do is if he wants to finish this fucking man in Chicago go down to that fucking National City Bank on 43rd Street and get a copy of them fucking—

2 Chase Manhattan.

1 Chase Manhattan and get a copy of the, you know, you get a photostatic statement.

2 He don't even have to do that, Tom, don't you understand?

1 Well, if he shows him that he won't have to go to nobody else because he'll be fucking finished with the —definitely lose his fucking job.

2 Well—

1 All right, listen, I'll talk it over with you when I see you.

2 Yeh, because he's going all the way with this guy and I don't want, I don't want, I hope I'm hoping this guy just tokenly repays some of that money, you know what I mean, because this way there's no, uh, nothing, no violence or anything, 'cause I know that, I know when this guy made up his mind to do something there's no, uh, there's no more stopping him, 'cause uh, I mean, uh, he went out to Chicago bent on doing something.

And, uh, that's what's going to happen. All right. Listen, maybe I'll see you tomorrow or something—

1 Yeh, I'll be in the city Monday or Tuesday.

2 Yeh, bring something over here so I got my uh, special forces here.

1 Yeh, all right. Let me see if anything comes up. If anything comes up sensible though. It's got to be sensible.

2 Look this is why we're in that daring business, the special forces. We wear the green berets. We do anything risky or non-risky. We got insurance policy floaters we take out.

1 Yeh, all right.

2 All right, I'll see you. So long.

1 Right.

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COUNTY COURT OF THE COUNTY OF NASSAU
STATE OF NEW YORK

Ind. # 20122

THE PEOPLE OF THE STATE OF NEW YORK

—*against*—

THOMAS ROGER KAISER, DEFENDANT

SIRS:

PLEASE TAKE NOTICE that the defendant in the above entitled action hereby appeals to the Appellate Division of the Supreme Court, Second Judicial Department, from a judgment of the County Court, County of Nassau, rendered on the 12th day of August, 1966, and from the sentence imposed upon the defendant on said day, and from each and every part of said judgment and sentence, and from each and every intermediate order therein made.

Dated, the 12th day of August, 1966

Yours, etc.,

F. COURTS BOUSE
Attorney for Defendant-
Appellant
Office & P. O. Address
Woodbury Road
Woodbury, New York

TO: WILLIAM CAHN
District Attorney of Nassau County
COUNTY CLERK OF NASSAU COUNTY

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 15, 1967

HON. GEORGE J. BEDLOCK, *Presiding Justice*

HON. MARCUS G. CHRIST )
HON. SAMUEL RABIN )
HON. JAMES D. HOPKINS ) *Associate Justices*
HON. A. DAVID BENJAMIN )
HON. GERALD NOLAN )

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

*v.*

THOMAS R. KAISER, APPELLANT

Order on Appeal from Judgment of Conviction

In the above entitled action, the above named Thomas R. Kaiser, defendant in this action, having appealed to this court from a judgment of the County Court, Nassau County, rendered August 12, 1966; and the said appeal having been argued by Peter L. F. Sabbatino, Esq., of counsel for the appellant, and by Henry P. DeVine, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

Enter:

HERMANN M. POGUL
Clerk of the Appellate Division

COUNTY CLERK'S OFFICE, )
STATE OF NEW YORK, ) ss:
COUNTY OF NASSAU )

I, HAROLD W. McCONNELL, Clerk of the County of Nassau and of the Supreme and County Courts, Courts of Record, do hereby certify that I have compared the annexed with the original Order of Appellate Div. Filed in my office May 18, 1967 and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court May 29, 1968.

/s/ Harold W. McConnell
Clerk

[SEAL]

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. STANLEY H. FULD, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

*against*

THOMAS R. KAISER, DEFENDANT-APPELLANT

CERTIFICATE GRANTING LEAVE

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BAIL

I, STANLEY H. FULD, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to § 520 of the Code of Criminal Procedure permission is hereby granted to the above named appellant to appeal to the Court of Appeals.

I further certify that in my opinion there is reasonable doubt whether the judgment of conviction will stand upon appeal to the Court of Appeals.

Bail as at present provided is fixed pending appeal to the Court of Appeals in the sum of $40,000.00 on condition that the appeal be brought on for argument during the September 1967 Term.

Dated at New York, New York
June 26, 1967.

STANLEY H. FULD
Chief Judge

* * * *

24173

Indictment No. 20122-1964

THE PEOPLE OF THE STATE OF NEW YORK,
PLAINTIFF-RESPONDENT

*-against-*

THOMAS R. KAISER, DEFENDANT-APPELLANT

NOTICE OF APPEAL TO THE COURT OF APPEALS

SIRS:

PLEASE TAKE NOTICE, that the defendant, above named, hereby appeals to the Court of Appeals of the State of New York, from the order of the Appellate Division of the Supreme Court, Second Judicial Department, entered in the office of the Clerk of the Appellate Division on the 15th day of May, 1967, a certified copy of which was filed in the office of the Clerk of the County Court, Nassau County, which order affirmed the judgment of the Defendant's conviction for the crimes of (a) Conspiracy to commit extortion; (b) Attempted extortion, and (c) Coercion, upon which the Defendant was sentenced to serve a term of one and one-half to seven years, and the Defendant hereby appeals from each and every part of said judgment and order, and from all intermediate rulings and orders.

PLEASE TAKE FURTHER NOTICE, that this appeal is taken pursuant to leave granted by the Hon. Stanley H. Fuld, Chief Judge of the Court of Appeals, by a Certificate granting leave, dated June 26, 1962, permitting this appeal to be taken and certifying that questions of law are involved which ought to be reviewed by the Court of Appeals, and that in his opinion there is

reasonable doubt whether the judgment of conviction will stand on appeal to the Court of Appeals.

Dated: New York, N. Y.,

Yours, etc.,

SABBATINO & TODARELLI
Attorneys for Defendant-Appellant
Office and Post Office Address
233 Broadway
New York, N. Y. 10007.

TO:

CLERK OF THE COUNTY COURT
County of Nassau,
Mineola, N. Y.

HON. WILLIAM CAHN
District Attorney of Nassau County
Attorney for Plaintiff-Respondent
Mineola, N. Y.

* * * * *

No. 470

Nassau Index # 24173 19—
Filed, Dec. 19, 1967, Franklin H. Ornstein,
County Clerk, Nassau County

COURT OF APPEALS

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STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of December in the year of our Lord one thousand nine hundred and sixty-seven, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, Presiding.
RAYMOND J. CANNON,
Clerk.

REMITTITUR December 7, 1967

2. No. 470. 67.

THE PEOPLE &C., RESPONDENT

*vs.*

THOMAS R. KAISER, APPELLANT

BE IT REMEMBERED, That on the 9th day of October in the year of our Lord one thousand nine hundred and sixty-seven, Thomas R. Kaiser, the appellant - in this cause, came here unto the Court of Appeals, by Sabbatino & Todarelli, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent - in said cause, afterwards appeared in said Court of Appeals by William Cahn, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Peter L. F. Sabbatino, of counsel for the appellant -, and by Mr. Henry P. De Vine, of counsel for the respondent - , and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the County Court, Nassau County, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Nassau County, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court, before the Judges thereof, &c.

/s/ Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office, )
Albany, December 7, 1967. )

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ Raymond J. Cannon
Clerk.

[SEAL]

* * * *

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

*v.*

THOMAS R. KAISER, APPELLANT

Decided December 7, 1967.

* * * *

KEATING, J. Irving Holzman was an executive of several corporations engaged in the distribution and operation of coin-operated equipment whose enterprises reached into four of the five boroughs of New York City as well as Nassau and Suffolk Counties. In recent years Mr. Holzman's business ventures grew and prospered to such an extent that the self-appointed "family" of sharers in the prosperity of honest businessmen determined that the time had come for Mr. Holzman to share his wealth—"to give up a piece" of his business.

Sometime during the early part of June, 1964, a concerted effort was commenced to extort $25,000 from Mr. Holzman as well as a 25% share of his business interests. As the arrangement was explained to Mr. Holzman, "If at the end of (a) week you have $1 left, [we] take 25 cents and you keep 75 cents."

Mr. Holzman, unmoved by the "family's" generosity and shaken by an assault on his wife by certain members of the "family", described to him as "animals", contacted the Nassau County police.

During the month of June the police, with the consent of Mr. Holzman, through the use of wiretaps and bugs, recorded numerous conversations of Mr. Holzman and one Salvator Granello, known to his "family" and "animals" as Sally Burns. These recordings clearly established the existence of an extortion conspiracy on the part of Granello, Dino Conte and others.

As Mr. Holzman's adamance persisted through June, the "family" apparently became more anxious. On the morning of June 30, 1964 Mr. Holzman's daughter, Mrs. Ronald Billings, then pregnant and residing in Plainview, received a call which, from its contents, could only have been made by one of the "animals." Mrs. Billings was advised that "if your father doesn't cooperate we'll come to

Sylvia Lane [Plainview] and kick your * * * pregnant belly in."

With this threat to the family of Mr. Holzman, the District Attorney's office determined that it could best protect Mr. Holzman and his family and determine precisely who was responsible for the threats by recording the telephonic communications made by Salvatore Granello and Dino Conte from several bars which they frequented and from which they had previously communicated with Mr. Holzman.

In a petition and affidavit filed pursuant to section 813-a of the Code of Criminal Procedure, an assistant district attorney of Nassau County asked for a court order to make the necessary wiretaps.

In testimony made under oath the assistant district attorney related, with particularity and detail, the events which had transpired up to that point and which have been briefly narrated above.

At the close of this testimony the following colloquy took place:

"The Court: At the present time have you been able to get any clue which would lead you definitely to the caller [who threatened Mrs. Billings]?

Mr. Levy: We have not, your Honor.

The Court: You feel as though this tap will assist you in that quest?

Mr. Levy: Yes, your Honor.

The Court: From your experience over the years do you feel that there is reasonable ground to believe that evidence of crime may be obtained by intercepting messages over this telephone?

Mr. Levy: Yes, your Honor. This telephone has been used by Salvatore Granello alias Sally Burns in telephone conversations with the complainant, Irving Holzman, in regard to the demand for $25,000 and 25 per-cent of his business.

The Court: So that in addition to the alleged extortion you feel faced here with the threats of violence and physical harm to innocent people?

Mr. Levy: Yes, your Honor, and the investigation regarding the assault on Mrs. Ruth Holzman at her home in

Nassau County as well as the threatening telephone call to Mrs. Billing[s].

The Court: I am satisfied that there is reasonable ground for granting your application."

The order issued by Justice SPITZER in compliance with the provisions of section 813-a recited the particular telephone numbers involved as well as their locations and went on to order "that under and pursuant to the provisions of Article I, Section 12, of the Constitution of the State of New York and the statutes relating thereto, and under and pursuant to the provisions of Section 813-a of the Code of Criminal Procedure of the State of New York and the statutes relating thereto, the District Attorney of Nassau County and the said *Norman J. Levy* as an Assistant District Attorney of Nassau County, and any and all persons employed or assigned to the control and direction of the District Attorney of Nassau County and the said *Norman J. Levy* be, and they hereby are, authorized and empowered to intercept and record all telephone communications made by and to *Salvatore Granello, Dino Conte* and any and all other persons communicating by both incoming and outgoing calls over the telephone located at *255 West 43rd Street, New York County, New York*, now designated as *212 LW 4-2523* and by whatsoever number the said telephone and telephone line may be hereafter designated".

The order was to be effective from July 1, 1964 until August 29, 1964.

On the evening of July 3 and morning of July 5, during the course of the tap made on the telephone located at the Headline Bar, there were recorded conversations between Dino Conte and the defendant-appellant in this action, Thomas Kaiser. The conversations clearly and beyond any reasonable doubt implicated the defendant as a co-conspirator who had supplied Granello with detailed information regarding the operation of Mr. Holzman's business enterprises. In addition both conversations involved discussions of what should be done in light of Mr. Holzman's intransigence. The defendant to his credit appears to have been against terrorizing him.

On July 15, 1964 Granello, Conte and Kaiser were arrested, and on July 16, 1964 Kaiser was arraigned on an

indictment charging him with coercion, attempted extortion, conspiracy to commit extortion, assault second degree and burglary second degree. The defendant was convicted, after a trial by jury, of all but the latter two crimes. At the trial and over the objection of defense counsel the transcripts of wiretap recordings made on July 3 and 5 were admitted into evidence.

Alleging, among other things, that the admission of this evidence was reversible error, the defendant appealed to the Appellate Division (Second Department). The court unanimously affirmed his conviction. The defendant appeals to this court by permission of the Chief Judge.

The defendant argues on this appeal that the Supreme Court in *Berger* v. *New York* (388 U. S. 41 [1967]) struck down as unconstitutional on its face the very statute which authorized the wiretap order and therefore the evidence seized pursuant to that order was erroneously admitted. The defendant urges, in addition, that all wiretap evidence should be held to be inadmissible because the seizure and divulgence of the evidence constitutes a violation of section 605 of the Federal Communications Act.

In *Berger* v. *New York* (*supra*), a case which involved the admissibility of evidence obtained by the use of a bugging device, the Supreme Court struck down section 813-a of the Code of Criminal Procedure. The statute read as follows: "An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhea[r]d or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the jus-

tice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same."

The Supreme Court, after examining the statute, concluded that it was "too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area and is, therefore, violative of the Fourth and Fourteenth Amendments" (388 U. S. *supra*, p. 44). Specifically the court found the statute "defective on its face" for several reasons: "Eavesdropping is authorized without requiring belief that any particular offense has been or is being committed; nor that the 'property' sought, the conversations, be particularly described. The purpose of the probable-cause requirement of the Fourth Amendment to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed is, thereby wholly aborted. Likewise the statute's failure to describe with particularity the conversations sought gives the officer a roving commission to 'seize' any and all conversations. It is true that the statute requires the naming of 'the person or persons whose communications, conversations or discussions are to be overheard or recorded * * *.' But this does no more than identify the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized.

As with general warrants this leaves too much to the discretion of the officer executing the order. Secondly, authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. Prompt execution is also avoided. During such a long and continuous (24 hours a day) period the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection to the crime under investigation. Moreover, the statute permits, and there were authorized here, extensions of the original two-month period—presumably for two months each—on a mere showing that such extension is 'in the public interest.' Apparently the original grounds on which the eavesdrop order was initially issued also form the basis of the renewal. This we believe insufficient without a showing of present probable cause for the continuance of the eavesdrop. Third, the statute places no termination date on the eavesdrop once the conversation sought is seized. This is left entirely in the discretion of the officer. Finally, the statute's procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits unconsented entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized. Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties. In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures" (388 U. S. *supra*, pp. 58-60).

Whatever the effect of the decision on bugging cases and future bugging orders in this State, it should be noted that nowhere in the opinion in *Berger* does the court hold that wiretapping comes within the purview of the Fourth Amendment. While we shall accept for the present the

appellant's assertion that *Berger* brought wiretapping within the purview of the Fourth Amendment and while we hold that the conditions set forth in *Berger* should, as a matter of policy, apply to future wiretapping orders issued under the statute, we believe that a reversal of the appellant's conviction is neither mandated by *Berger* nor by the prophylactic purpose of the exclusionary rule to which wiretap evidence obtained in violation of the Fourth Amendment is now subject.

At the time the wiretap order in the case at bar was issued, there were no Federal consttiutional restraints on the securing of wiretap evidence. The Supreme Court had steadfastly adhered to its decision in *Olmstead* v. *United States* (277 U. S. 438) that wiretapping, accomplished without a trespass into a person's home or other premises, does not violate the Fourth Amendment's prohibition against unreasonable searches and seizures. Indeed, to this day *Olmstead* has not been squarely repudiated by the Supreme Court.

The Constitution and the laws of this State, however, place severe restrictions on the right of public officials to obtain evidence by wiretapping. In 1938 the people of this State ratified setcion 12 of article I of the State Constitution. That amendment provides: "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

Section 813-a of the Code of Criminal Procedure quoted earlier and section 738 of the former Penal Law supplemented the provisions of the Constitution and extended them to all eavesdropping evidence obtained by "instrument" without the consent of one of the parties to the conversation.

In *People* v. *McCall* (17 N Y 2d 152) we held that the expressions "oath or affirmation" and "reasonable grounds to believe" contained in the statute "could have no other

meaning" than to require the same factual basis to be shown for the issuance of the eavesdropping order "as in the case of search warrants" (17 N Y 2d 159). And relying upon cases in which we held affidavits to be insufficient in ordinary search warrant cases, we held that the wiretap evidence should have been excluded.

Subsequently in *People* v. *McDonnell* (18 N Y 2d 509) we applied the same constitutional standards governing ordinary searches in holding that a defendant—not a party to conversation over a telephone maintained for his benefit—had standing to challenge the factual basis upon which the wiretap order was issued. And in *Matter of Sarisohn* (21 N Y 2d 36, decided herewith) we again strictly adhere to the standards set down in cases involving ordinary searches and seizures.

It is thus "clear that 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment' * * * [was] made a precondition of lawful electronic surveillance" (*Lopez* v. *United States*, 373 U. S. 427, 464 [dissenting opn. of BRENNAN, J.]) and that no wiretap or bugging order could issue except upon an adequate factual showing, i.e., probable cause to believe that a crime had been committed and that the conversations particularized in the order would be seized.

With this requirement as with all the requirements of the statute the order in question complied. The most cursory examination of the testimony of the assistant district attorney made under oath before the Judge who issued the warrant clearly indicates that there was probable cause to believe that a crime was being committed and that the conversations regarding threats to Mr. Holzman and his family would be obtained.[1]

It is true that the order did not adequately specify the precise conversations which were sought—although the testimony of the assistant district attorney under oath, which becomes part of the order, did (Code Crim. Pro. § 813-a); that the order was not sufficiently limited in

[1] The conversations which were seized related in part to what was going to be done by the conspirators in light of Mr. Holzman's refusal to capitulate to the lawless and disgraceful conduct of the defendant and his co-conspirators.

time—although there is no evidence that the execution of the order exceeded a reasonable period and the actual conversations seized came within a limited period of three days; that no exigent circumstances were alleged for dispensing with the notice requirement—although, under Supreme Court decisions defining "exigent circumstances", those circumstances were present here (*Ker* v. *California*, 374 U. S. 23, 37-40); and that there was no return on the warrant—although we presume, since the defendant did not argue otherwise, that a return was made.[2]

The reason for these defects is obvious—there has been no previous decision outlining the necessity for those requirements which *Berger* found to be mandatory. Under these circumstances, a reversal of the conviction would not be warranted either under the decisions of this court or the Supreme Court (*People* v. *McQueen*, 18 N Y 2d 337; *People* v. *DeRenzzio*, 19 N Y 2 d 45; *People* v. *Rensing*, 20 N Y 2d 936; *Johnson* v. *New Jersey*, 384 U. S. 719; *Stovall* v. *Denno*, 388 U. S. 293).

In *Stovall* v. *Denno* (388 U. S. 297) the Supreme Court set out the governing considerations in determining whether a fundamental change in constitutional interpretation should be applied retroactively: "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. '[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provisions of the Constitution on which the dictate is based. Each constitutional rule of crimi-

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[2] The authorization for the wiretaps included not only the conversations of Salvatore Granello and Dino Conte and those with whom they communicated but all those who communicated over the telephone located at the Headline Bar. Such authorization was necessary for the purpose of immunizing the police from prosecution for violating section 738 of the former Penal Law, since the very device which the police were apparently required to employ would pick up all conversations on the telephone in question. It is precisely because eavesdropping poses such a threat to the right of privacy that it should be undertaken under strict judicial supervision and subject to the severest constitutional restraints.

nal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved.'"

The standards outlined in *Stovall* are identical to the standards we have adopted in recent cases. In *People* v. *McQueen* (*supra*) we considered the effect that a retroactive application of the standards outlined in *Miranda* v. *Arizona* (384 U. S. 436) would have on the administration of justice in our courts as well as the fact that the evidence which would be excluded under the *Miranda* rulings in no way affected the "integrity of the fact-finding process" (*Linkletter* v. *Walker*, 381 U. S. 618, 639). In so doing we overruled explicitly the rationale of our decision in *People* v. *Loria* (10 N Y 2d 368), which had given retroactive effect on the exclusionary rule enunciated in *Mapp* v. *Ohio* (367 U. S. 643) as to those cases still on direct appeal. The basis of the ruling was the existence of a so-called "general rule" which required that this court apply the law as it exists at the time of our decision. A careful examination of the cases cited in *Loria* reveal that there was no such general rule and that the same considerations we adopt here, in fact, governed all those cases in which retroactive effect had been given.[3] (See *Knapp* v. *Fasbender*, 1 N Y 2d 212; *Matter of Tartaglia* v. *McLaughlin*, 297 N. Y. 419; see also, *Robinson* v. *Robin Dry Dock & Repair Co.*, 238 N. Y. 271; *Black Riv. Regulating Dist.* v. *Adirondack League Club*, 307 N. Y. 475; *Harris* v. *Jex*, 55 N. Y. 421.)

Applying these standards in the case at bar, we are led to the conclusion that the *Berger* decision should be given only prospective effect. The purpose of the exclusionary rule, to which *Berger* made eavesdropping evidence subject, is deterrence of future police conduct. Applying

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[3] In *People* v. *Friola* (11 N Y 2d 157) the court limited the effect of *People* v. *Loria* (*supra*) and held that *Mapp* v. *Ohio* (*supra*) would be applied retroactively only to those cases on direct appeal in which an objection had been taken to the admission of the allegedly illegally seized evidence. This decision, as the dissenting Judges noted, amounted to a rejection of the rationale of the so-called general rule (11 N Y 2d, *supra*, p. 161).

*Berger* retroactively will not, therefore, undo the violation of the defendant's rights which may have already taken place. The admission of the wiretap evidence has no effect on the "integrity of the fact-finding process" (*Linkletter* v. *Walker, supra*). Indeed, the probative value of the evidence is beyond question. In addition, thousands of eavesdropping orders have been issued in reliance upon the statute and the decisions of this court which the Supreme Court had seen fit not to disturb. (See *People* v. *Dinan*, 11 N Y 2d 350, cert. den. 371 U. S. 877; *People* v. *Pugach*, 16 N Y 2d 504, app. dsmd. 383 U. S. 575; *People* v. *Cohen*, 18 N Y 2d 650, cert. den. 385 U. S. 976, rehearing den. 385 U. S. 1032). Moreover, even under prior law no eavesdropping order could be sustained without " the procedure of antecedent justification before a magistrate", which is central to the Fourth Amendment. Under these circumstances we hold that *Berger* should be held applicable only to those cases in which the orders were issued or the eavesdropping took place after the date of that decision.

The argument is advanced, however, that, since the statute was struck down as unconstitutional on its face, an order issued pursuant to it cannot be upheld. This argument is similar to that which has been rejected in all the recent decisions on retroactivity. The argument is that, if we hold that particular police conduct is now violative of an individual's constitutional rights, how can we say that the same conduct in the past did not likewise offend against his rights? Similarly if the offensive police conduct was authorized by a statute which is now found to be unconstitutional, how can we say that past conduct authorized thereunder was not equally violative of the defendant's rights? [4] The answer to both these questions is that logic must sometimes give way to "reason[s] of practicality and necessity" (*People ex rel. Keitt* v. *Mc-*

[4] There is language in our recent holding in *People* v. *Grossman* (20 N Y 2d 346) which supports this reasoning. The retroactivity question was not argued in *Grossman* and we did not have an opportunity to reflect upon the most recent decision of the Supreme Court, *Stovall* v. *Denno* (*supra*). Any language in *Grossman* which is inconsistent with this opinion is expressly overruled.

*Mann*, 18 N Y 2d 257, 262). As this court observed in *People* v. *McQueen* (*supra*, p. 343): "The past can seldom be reformed in the image of the present, and it is manifest that not every type of conviction can be set aside where the wisdom of the present does not coincide with that of the past."

Our discussion heretofore has assumed that *Berger*, in fact, affected wiretapping provisions of section 813-a of the Code of Criminal Procedure. A majority of the court, however, is of the view that, while some of the language and the rationale of the *Berger* decision are applicable to all forms of eavesdropping, the specific holding of the case affected only the bugging provisions of the statute and that those portions authorizing wiretaps survive the *Berger* decision.[5] We therefore conclude, contrary to the defendant's allegation, that the order in question was not issued pursuant to a statute which was declared to be unconstitutional.

* * * *

This view of the holding of *Berger* is, we believe, supported by a careful reading of the opinion of Mr. Justice CLARK for the majority. The discussion of the *Olmstead* case is particularly instructive. To quote from the opinion: "The Court was faced with its first wiretap case in 1928, *Olmstead* v. *United States*, 277 U. S. 438. There the interception of Olmstead's telephone line was accomplished without entry upon his premises and was, therefore, found not to be proscribed by the Fourth Amendment. *The basis of the decision was that the Constitution did not forbid the obtaining of evidence by wiretapping unless it involved actual unlawful entry into the house.* Statements in the opinion that 'a conversation passing over a telephone wire' cannot be said to come within the Fourth Amendment's enumeration of 'persons, houses, papers, and effects' have been negated by our subsequent cases as hereinafter noted. *They found 'conversation' was within the Fourth Amendment's protections,*

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[5] Where a portion of statute is held to be unconstitutional, the question of whether the other portions survive is one for the State courts. (*People* v. *Manucuso*, 255 N. Y. 463, 472; *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298, 302; *Berea Coll.* v. *Kentucky*, 211 U .S. 45, 55.)

and that the use of electronic devices to capture it was a 'search' within the meaning of the Amendment, and we so hold." (388 U. S. 41, 50-51, *supra;* emphasis added.)

While Mr. Justice CLARK indicates that that portion of *Olmstead* which held that speech was not capable of seizure has been "negated" by subsequent cases, nowhere does his opinion state that the basis of the decision in *Olmstead* that wiretapping accomplished without an intrusion into the caller's premises infringes on no constitutional right —has been "negated" by any subsequent decision.

Indeed, as late as 1964 in *Clinton* v. *Virginia* (377 U. S. 158), the court adhered to the reasoning evolved in *Olmstead.* The court reversed a conviction obtained by the use of eavesdropping evidence involving a trespassory intrusion into a constitutionally protected area (*Goldman* v. *United States,* 316 U. S. 129; *Silverman* v. *United States,* 365 U. S. 505). And lest anyone think that *Olmstead* was overruled, since the court wrote no formal opinion, Mr. Justice CLARK wrote: "Since the Court finds that the 'spiked' mike used by the police officers penetrated petitioner's premises sufficiently to be an actual trespass thereof, I join in the judgment." (377 U. S. 158.)

The court's apparent intention, to stick to a distinction which can survive only as long as *Olmstead* remains viable, is evidenced in the closing paragraph of the *Berger* opinion. In attempting to allay fears that the *Berger* opinion would have the effect of outlawing all eavesdropping orders, Mr. Justice CLARK cited *Goldman* v. *United States* (*supra*) as an apparent instance of eavesdropping which would remain unaffected. *Goldman,* involving an eavesdropping accomplished without a physical trespass, relied solely upon the reasoning in *Olmstead* and strongly reaffirmed that decision.

While there is, as we have noted, language in *Berger* indicating that wiretapping may be held to be within the provisions of the Fourth Amendment this language hardly approaches the level of dictum and, since on the same day the Supreme Court decided *Berger* it enunciated the rule that "sound policies of decision-making" "[require] * * * that constitutional adjudications not stand as mere dictum" (*Stovall* v. *Denno,* 388 U. S. 301, *supra*), we con-

clude that *Berger* did not affect the wiretapping provisions of section 813-a of the Code of Criminal Procedure and that its decision affected only that "language [which] permits a trespassory invasion of the home, by general warrant, contrary to the Fourth Amendment" (*Berger* v. *New York, supra*, p. 64).

There remains for our consideration the second argument advanced by the defendant that the evidence should have been excluded because it was obtained in violation of section 605 of the Federal Communications Act. The Supreme Court has held, in the exercise of its supervisory powers over the Federal courts, that wiretap evidence is inadmissible in Federal prosecutions. The court has, however, held that the States are not required to exclude such evidence. The basis of this decision was outlined by the Chief Justice as follows: "[D]ue regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect." (*Benanti* v. *United States*, 355 U. S. 96, 101; see, also, *Schwartz* v. *Texas*, 344 U. S. 199; *Pugach* v. *Dollinger*, 365 U. S. 458.)

This statement, we believe, constitutes a complete answer to the argument advanced by the defendant that the wiretap evidence should be excluded in this State proceeding because its admission violates the Federal statute. If Congress did not intend to thwart a State rule of evidence, we see no compelling reason to exclude the use of wiretap evidence.

The defendant argues, however, that the very interception of the telephonic communication violates Federal law and that "At this time when the people of this state and country are being called upon to reaffirm their allegiance to the rule of law, it is a complete farce for the courts, prosecutors and police of this state to sanction such criminal behavior."

This argument is not without merit. If the issue were as simple as he suggests, a reversal would surely be mandated. Do we not, however, sanction criminal conduct and promote disrespect for law when we allow a man who is clearly guilty, who is convicted on the basis of evidence obtained in conformity with the strictest standards of the

Constitution, to go free and menace the security of law-abiding citizens? This is not to say that the ends justify the means and that proof of guilt sanctions violations of constitutional rights. But when the sole justification for the exclusion of evidence is that its admission will sanction criminal conduct and promote disrespect for law, we are obligated to consider whether the more desirable result will flow from excluding the evidence.

Moreover, we are dealing here with the violation of a statute which those charged with the primary and exclusive responsibility for its enforcement have continuously refused to enforce against State officials who, acting pursuant to State law, violate the statute. (Statement of Attorney General Robert F. Kennedy to Senate Judiciary Committee, March 29, 1962; Statement of Attorney General William P. Rogers, *New York Times*, Dec. 24, 1957, p. 10, col. 1.) If the statute is viable, let it be enforced. If the statute is flouted, let the offender be prosecuted. Because the constitutional provisions carried no penal sanctions to discourage violation, exclusionary rules were necessary. No such problem is presented by a statute carrying penal sanctions.

In light of what can only be deemed a policy of nullification by Federal officials, a State court, we believe, is justified in questioning whether it should indirectly enforce a Federal statute which the Executive has consistently refused to enforce—a refusal the Congress has impliedly sanctioned. As the Supreme Court once observed: "It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is written on the statute books, and to disregard the gloss which life has written upon it." (*Nashville, C. & St. L. Ry.* v. *Browning*, 310 U. S. 362, 369.) " 'Deeply embedded traditional ways of carrying out state policy * * *'—or not carrying it out—'are often tougher and truer law than the dead words of the written text.' " (*Poe* v. *Ullman*, 367 U. S. 497, 502.)

Under these circumstances we decline to hold that wiretap evidence obtained in substantial compliance with the strictest provisions of the Constitution of the United States and of this State must be excluded in criminal prosecutions in this State.

We have thus far been concerned with eavesdropping pre-*Berger* v. *New York (supra)*. In light of recent lower court decisions (see, e.g., *Matter of Intercepting Tel. Communications*, 55 Misc 2d 163), we feel it would be desirable to set forth what we believe to be the proper procedure as a result of the *Berger* decision. (See, e.g., *People* v. *Huntley*, 15 N Y 2d 72.)

We hold, in conformity with the traditional policy of this court to construe statutes in such a manner as to uphold their constitutionality (*People* v. *Epton*, 19 N Y 2d 496, cert. den. —— U. S. ——; *People* v. *Finkelstein*, 9 N Y 2d 342; *Matter of Coates*, 9 N Y 2d 242; *People ex rel. Morriale* v. *Branham*, 291 N. Y. 312; McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 150, p. 237, n. 97, and cases cited therein)[6], and in conformity with our specific policy of construing section 813-a so as to provide the same protections afforded by the Fourth Amendment, that, in addition to a showing of probable cause, an order issued under the statute must particularize to the extent possible the exact nature of the conversations sought, that it must provide for a return, that it must be severely limited in time, as outlined in *Berger*, and that it must provide for termination as soon as the conversations are seized. In addition, it should allege that exigent circumstances exist, viz., that the "destruction" of the object of the "search" will result unless the notice requirement is waived (*Ker* v. *California*, *supra*).

This rehabilitation of the statute is possible even though the Supreme Court struck the statute down on its face. In *Dombrowski* v. *Pfister* (380 U. S. 479) the Supreme Court enjoined the enforcement of a State statute on the ground that it was unconstitutional on its face. The action was taken at the behest of petitioners, who, like Berger, were found to have been "affected" by the statute,

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[6] As Chief Judge FULD recently wrote, this court "when faced with the choice of declaring a statute unconstitutional * * * or interpreting the legislation in such a way as to supply a missing constitutional safeguard * * * [has never] hesitated 'to embrace [the course] which will preserve [the statute's] validity.'" (*Bell* v. *Waterfront Comm. of N. Y. Harbor*, 20 N Y 2d 54, 62.)

although not necessarily directly deprived of any rights thereunder.

The language of the court, in indicating that the statute could be rehabilitated, is applicable here: "The State must, if it is to invoke the statutes after injunctive relief has been sought, assume the burden of obtaining a permissible narrow construction in a non-criminal proceeding before it may seek modification of the injunction to permit future prosecutions" (380 U. S., *supra*, p. 491).

In the case at bar no such special proceeding to obtain a limiting construction of the statute is necessary, as we do not deal with a criminal statute.

We conclude by noting that, as a result of our construction of the statute, the people of this State are afforded greater protection against *all* forms of electronic eavesdropping, including that which involves no trespass whatever, than even the decisions of the Supreme Court have provided. Yet much as we might like, we cannot ignore the realities of life. We cannot ignore the rise of organized criminal activity and "families" who promise to provide the true "big brothers" of 1984. As the facts in this case reveal, some intrusion under the most severely regulated and restricted conditions are necessary, lest the only security we enjoy is that from government intrusion. This was the conclusion of the President's Commission on Law Enforcement and Administration of Justice, 200-203 (1967) and it is our conclusion today.

We have examined the remaining arguments raised by the appellant and find that they do not warrant reversal (*People* v. *Kingston*, 8 N Y 2d 384).

The judgment appealed from should be affirmed.

Chief Judge FULD (dissenting). The decision which the court is now making, I suggest, disregards both the holding and the spirit of *Berger* v. *New York* (388 U. S. 41). The eavesdropping statute—section 813-a of the Code of Criminal Procedure—held invalid in that case is the very same statute under which the ex parte wiretapping order in the case before us was granted. The Supreme Court there ruled that section 813-a was "deficient"

and unconstitutional "on its face" as an impermissibly broad and sweeping intrusion into the constitutionally protected area of individual privacy (388 U. S., at pp. 44, 55). If this language has any meaning, it is that the statute is invalid in its entirety insofar as it authorizes eavesdropping, whether the particular form of such eavesdropping be "bugging" as in *Berger* or wiretapping as in the present case. Moreover, there cannot be any doubt that the dominant considerations on which the *Berger* decision was predicated are equally applicable to both of these types of surreptitious interception. In my judgment, it is the impermissible intrusion into the privacy of conversations, not merely an unlawful physical entry, that is and should be proscribed and outlawed. (Cf. *Katz* v. *United States*, 369 F. 2d 130, cert. granted 386 U. S. 954.)

The Supreme Court found section 813-a to be constitutionally "offensive" in at least four respects. First, it improperly authorized eavesdropping "without requiring belief that any particular offense has been or is being committed" and, in effect, gives "the officer a roving commission to 'seize' any and all conversations" akin to the old repudiated "general warrant". Second, the statute's "authorization of eavesdropping for a two-month period [was] the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause". Third, "the statute place[d] no termination date on the eavesdrop once the conversation sought is seized." And, fourth, the statute "ha[d] no requirement for notice as do conventional warrants" and did not "provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties" (pp. 59-60). "In short," the Supreme Court summed up the matter, "the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures" (388 U. S., at p. 60).

Quite obviously, the defects which the court pointed to exist whether section 813-a be invoked as authorization for bugging or for wiretapping. In fact, the Supreme Court failed to make any distinction between bugging and wiretapping other than to observe that they were

both forms of eavesdropping which developed at different times (388 U. S., at pp. 45-47). The court did, it is true, refer to its 1928 decision in *Olmstead* v. *United States* (277 U. S. 438) in which wiretapping, in and of itself, was held outside of the protective ambit of the Fourth Amendment. The court in *Berger*, however, expressly held that *Olmstead* was no longer sound law insofar as it differentiated between "conversation" and tangible property. The court thus noted that statements in the *Olmstead* opinion to that effect had been "negated" by later decisions which held that "the use of electronic devices to capture * * * ['conversation'] was a 'search' within the meaning of the Amendment" (p. 51).

Although the court in *Berger* did not, in so many words, overrule the other basis for the *Olmstead* decision—that wiretapping did not per se entail a physical invasion of private premises—it is evident from a reading of the *Berger* opinion that that aspect, too, has little, if any, remaining force. The thrust of the *Berger* opinion, indeed its underlying theme, was that eavesdropping, the generic term encompassing wiretapping and bugging is within the ban of the Fourth Amendment not because it may constitute a trespass in the technical sense but because "[b]y its very nature * * * [it] involves an intrusion on privacy" of unduly broad scope (388 U. S., at p. 56).[1] "Few threats to liberty exist", the court declared (p. 63), "which are greater than that posed by the use of eavesdropping devices." In this regard, it is significant that both Justice DOUGLAS, in concurring (p. 64), and Justice BLACK, in dissenting (p. 80), regarded the *Berger* decision as necessarily overruling *Olmstead* and that Justice WHITE, in his dissent (p. 113), viewed the issues presented as not turning on whether it was bugging or wiretapping which happened to be involved.

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[1] In its discussion of *Silverman* v. *United States* (365 U. S. 505), it was pointed out that in that case, "[s]ignificantly, the Court held that its decision did 'not turn upon the technicality of a trespass * * * as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area'" (388 U. S., at p. 52).

Once it be determined that section 813-a of the Code is unconstitutional in its entirety, the impact of *Berger* may not properly be avoided by holding that it is not to be applied to cases (such as this) which come to our court in the normal course of the appellate process, even though the trials antedated that decision. I can add little to what Judge CHRIST has so ably stated on the subject in his dissent in *People* v. *Morhouse* (21 N Y 2d 66, also decided today). In *Berger*, the Supreme Court held that evidence obtained pursuant to section 813-a was the product of an illegal search and seizure in violation of the Fourth Amendment, and we have consistently held, with respect to such evidence, that the exclusionary rule announced in *Mapp* v. *Ohio* (367 U. S. 643) should be applied "in our review of pending appeals," despite the fact that the trial took place before *Mapp* and were conducted in the light of the law as it then existed. (*People* v. *O'Neill*, 11 N Y 2d 148, 152; see, also, *People* v. *Loria*, 10 N Y 2d 368, 371; *People* v. *Muller*, 11 N Y 2d 154.) In *People* v. *McQueen* (18 N Y 2d 337), it is true, the court declined to give retrospective application to the new rules enunciated in *Miranda* v. *Arizona* (384 U. S. 436) concerning the use of confessions obtained by police interrogation but we neither held nor intimated that our prior practice in search and seizure cases should be modified. In point of fact, just a few months ago—and, of course, after *MCQueen* (18 N Y 2d 337, *supra*)—our court in *People* v. *Grossman* (20 N Y 2d 346), involving the very statute now before us, wrote that, since *Berger* had held section 813-a unconstitutional, "it is as if there had never been any valid authority for the police to act as they did" (p. 349).[2] To change the practice to the prejudice of the defendants now before us (Kaiser and Morhouse) is highly unfair, if not unconstitutional, smacking as it does of unequal protection of the laws.

Although there may be some situations in which prospective application of a new rule may be dictated by the

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[2] The majority avoids this pronouncement by blandly declaring (opn., p. 99 n. 4) that "[a]ny language in *Grossman* * * * inconsistent with this opinion is expressly overruled"!

fact that the police placed "reliance" on old rules or prior decisions, the present is not such a situation. The Supreme Court, it is true, had not previously ruled that evidence obtained by means of wiretapping could not be used in a State court. But it had, repeatedly and for many years, held that the tapping of telephone wires and the disclosure of the contents of the communications intercepted constitute a crime under section 605 of the Federal Communications Act. (See, e.g., *Benanti* v. *United States*, 355 U. S. 96, 100.) Manifestly, in such a situation, the prosecution should not be permitted to make the criminal conduct of its agents a basis for a claim of "reliance" on the prior state of the law.

As the majority here acknowledges, the order permitting the wiretap in the present case contained many "defects" (opn., p. 97) of the kind which the Supreme Court in *Berger* held to be violative of essential constitutional safeguards. The order broadly authorized the interception and recording of "*all telephone communications made by* and to Salvatore Granello, Dino Conte and *any and all other persons* communicating by both incoming and outgoing calls over the telephone located at 255 W. 43rd Street, New York County, New York * * * [*from July 1*] *until the 29th day of August, 1964.*"[3] As is manifest—and I cull from the opinion in *Berger* (388 U. S., at p. 59)—the effect was to give the officer "a roving commission", on the order of a general warrant," to 'seize' any and all conversations". Moreover, the order, as indicated, was to be effective for two months, a length of time expressly condemned by the Supreme Court in *Berger;* as the court pointed out, "authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause." * * * During such a long and continuous

[3] The order further provided that the Nassau County District Attorney or his agents were "authorized and empowered to cut, break, tap, and make connection with any and all wires leading to and from said telephone instrument that the said District Attorney * * * [and a named assistant district attorney] or their agents may deem reasonably necessary to intercept telephone communications transmitted over the said wire".

(24 hours a day) period the conversations of any and all persons * * * will be seized indiscriminately and without regard to their connection with the crime under investigation" (p. 59). And, since its success necessarily depends on secrecy, the procedure authorized by the order has—and I again quote from the *Berger* opinion (p. 60)—"no requirement for notice as do conventional warrants" and does not "provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties."

The majority has attempted to overcome the objections voiced in *Berger* by a suggested retrospective re-interpretation of section 813-a to narrow its unconstitutionally broad reach. As support for this "rehabilitation" of the statute, the majority points to *Dombroski* v. *Pfister* (380 U. S. 479). That case, posing an entirely different problem, is wholly inapposite. It involved an excessively broad State statute, regulating speech and expression, which had not yet been construed by the State courts. In upholding the power of a Federal court to enjoin criminal prosecution under that statute so long as its wide reach remained unlimited by construction, the Supreme Court left open the possibility of the State's obtaining "an acceptable limiting construction" from the State courts "in a noncriminal proceeding" for the purpose of future prosecutions (380 U. S., at pp. 491, 497). Here, in sharp contrast, the applicable statute had been authoritatively construed by this court in *Berger* (18 N Y 2d 638) and had, on the basis of that construction, been held unconstitutional on its face by the Supreme Court (388 U. S. 41, *supra*). I have come on no case, and none has been called to our attention, in which a State court has presumed to resuscitate a statute by a retroactive re-interpretation after the United States Supreme Court had (as it has done here) declared it constitutionally dead.

In any event, though, even if we were to assume that a court has such power, it is impossible to view the majority's interpretation in this case as "an acceptable limiting construction". Thus, the court's opinion herein does nothing more than to outline, in general terms, the limitations which it proposes to read into the statute, and has

apparently left the precise delineation of such limitations to future judicial decision. The Supreme Court in *Berger*, however, made it plain that it would not uphold any legislation authorizing eavesdropping which did not embody " 'precise and discriminate' requirements" sufficient to comply with the strict demands of the Fourth Amendment (388 U. S., at p. 58). The limitations here suggested are entirely too vague and indefinite to satisfy that criterion. Actually, the proposed "rehabilitation" would consist not merely of engrafting on the statute "a missing constitutional safeguard", as was the situation in *Matter of Bell* v. *Waterfront Comm. of N. Y. Harbor* (20 N Y 2d 54, 62; see, also, *People* v. *Epton*, 19 N Y 2d 496), but of completely rewriting the statutory language and adding, under the guise of construction, matters of detail which are more appropriately left to legislative action.

In this connection, I must say that I do not understand how our court may legitimately fashion a "procedure" for wiretapping and for the issuance of orders permitting such wiretapping. The Legislature has outlawed all wiretapping except that authorized by section 813-a (see Penal Law, § 250.00, subd. 3; § 250.05 [formerly §§ 738, 739]) and has expressly provided in CPLR 4506 that evidence obtained by wiretapping (or other eavesdropping) without a court order issued pursuant to that statute, "shall be inadmissible for any purpose in any civil or criminal action". Beyond that, since the revisers of this State's Code of Criminal Procedure have already drafted and proposed an article (art. 370), to replace section 813-a, which "precisely set[s] forth the forms and procedures to be followed at each phase of eavesdropping, from application through termination to judicial record-keeping", and contains "a number of restrictions in the utilization of eavesdropping not previously found in New York law nor specifically called for in the *Berger* decision,"[4] it seems

[4] See Proposed New York Criminal Procedure Law (Temporary Commission on Revision of Penal Law and Criminal Code, 1967), art. 370, p. 401. The Staff Comment recites (p. 402) that "this article provides a comprehensive scheme for the restricted issuance of eavesdropping warrants, based upon strict standards of

to me unwise, if not mischievous, for a court to undertake to assume what is a strictly legislative function.

Further, and quite apart from the combined impact of the *Berger* decision and CPLR 4506, I am more than ever confirmed in the view I expressed in dissent in *People* v. *Dinan* (11 N Y 2d 350, 356) that all evidence obtained through wiretapping should be excluded on the ground that its very introduction in open court constitutes a Federal crime in violation of section 605 of the Federal Communications Act. (See, also, *People* v. *McCall*, 17 N Y 2d 152, 160, concurring opn.; *People* v. *Cohen*, 18 N Y 2d 650, 651, dissenting opn.)

In sum, then, since section 813-a has been invalidated and stricken in its entirety, no authorization existed for the ex parte order permitting wiretapping in this case. Consequently, CPLR 4506 requires the exclusion from evidence of the conversations intercepted by means of such wiretapping.

The judgment appealed from should be reversed and a new trial ordered.

Judges VAN VOORHIS, BURKE, SCILEPPI, BERGAN and BREITEL concur with Judge KEATING; Chief Judge FULD dissents and votes to reverse and order a new trial in a separate opinion.

Judgment affirmed.

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probable cause and necessity, and demanding scrupulous particularity in the description both of the person and place upon which the eavesdropping is to be conducted and the nature of the evidence sought thereby."

IN THE SUPREME COURT OF THE UNITED STATES

BEFORE: HONORABLE STANLEY H. FULD, Chief Judge of the Court of Appeals of the State of New York

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

*—against—*

THOMAS R. KAISER, PETITIONER

The above named petitioner having been heretofore on the 12th day of August, 1966, convicted of the crimes of Conspiracy To Commit Extortion, Attempted Extortion and Coercion after a trial at the County Court, Nassau County, and sentenced on the 12th day of August, 1966 to the State Prison for a term of not less than one and one-half years nor more than seven years, and said judgment having been affirmed by the Appellate Division of the Supreme Court of the State of New York on May 15, 1967, and, upon appeal to the Court of Appeals of the State of New York, the judgment of conviction and sentence for the crimes aforesaid having been affirmed on December 7, 1967, and the petitioner having made application for a stay of the execution and enforcement of the judgment of the Court of Appeals of the State of New York pending the making and determination of a Petition for Certiorari to the Supreme Court of the United States and the making of an application for a further stay from a Justice of the said Supreme Court, and after hearing PETER L. F. SABBATINO, ESQ., and HENRY J. BOITEL, ESQ., attorneys for the petitioner, and HENRY P. DEVINE, Assistant District Attorney of Nassau County, for the People, it is hereby,

ORDERED, that the Judgment heretofore issued herein on the 7th day of December, 1967, be, and it hereby is, in all respects, stayed for a period of 40 days from the date hereof in order to enable the petitioner to apply to the Supreme Court of the United States, or to a Justice thereof, for a further stay, or for such other relief as may be required; and it is further

ORDERED, that the bail heretofore fixed in the sum of $40,000.00 for the petitioner be and it hereby is continued for the aforementioned period of 40 days; and it is further

ORDERED, that the original of this order be filed in the office of the Clerk of the County Court, Nasau County, and that a copy hereof be served upon the District Attorney of Nassau County, and the Clerk of the Court of Appeals of the State of New York forthwith.

Dated: New York, New York, February 2, 1968.

/s/ Stanley H. Fuld
Chief Judge of the Court of Appeals.

# SUPREME COURT OF THE UNITED STATES

No. 1451 Misc., October Term, 1967

THOMAS R. KAISER, PETITIONER

*v.*

NEW YORK

On petition for writ of Certiorari to the Court of Appeals of the State of New York

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1350 and placed on the summary calendar.

April 22, 1968

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